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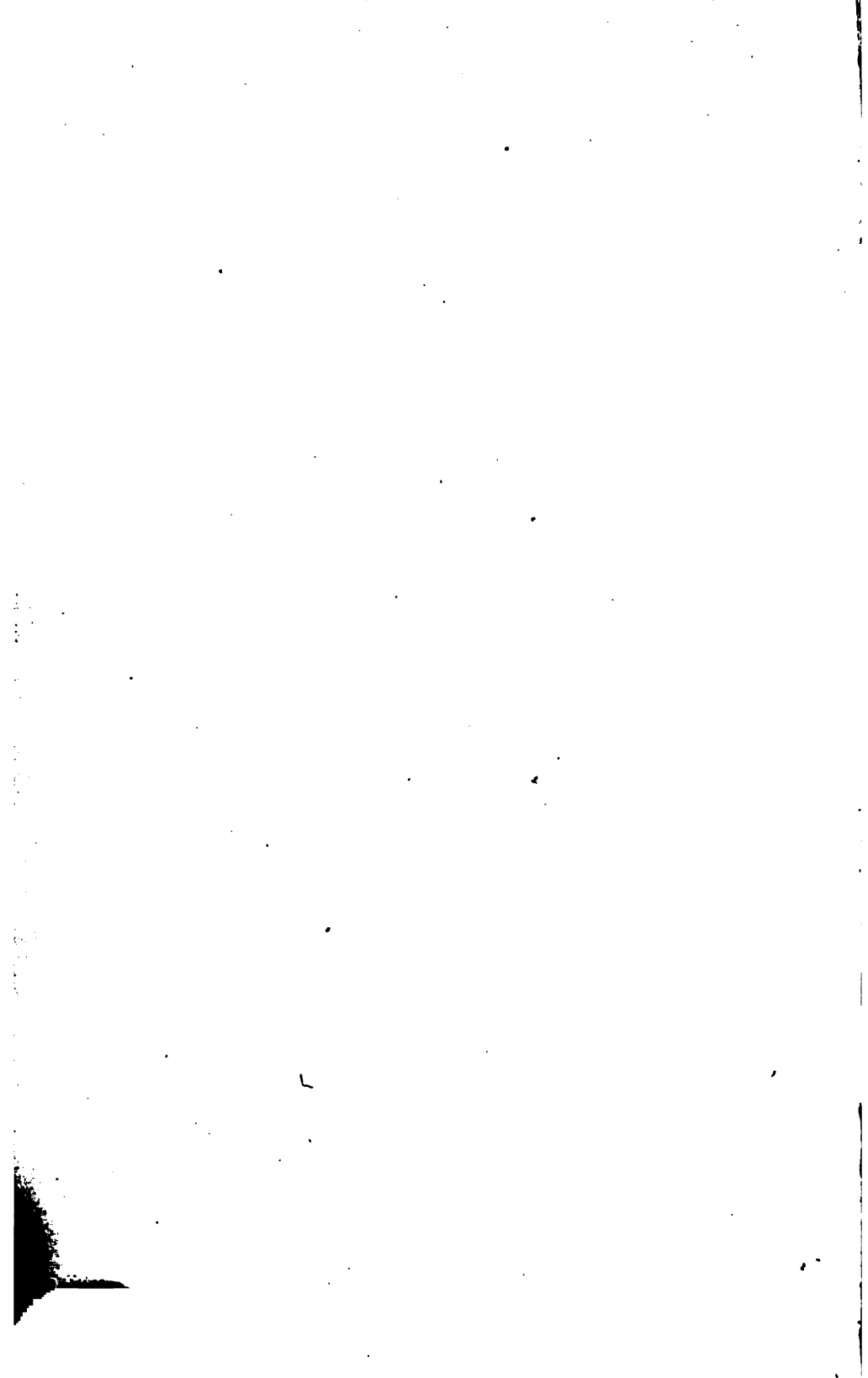
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A REPORT

OF THE CASE OF

THE QUEEN *v.* GURNEY AND OTHERS,

IN THE

COURT OF QUEEN'S BENCH:

(THE SUMMING UP REVISED BY THE LORD CHIEF-JUSTICE.)

WITH

An Introduction,

CONTAINING A HISTORY OF THE CASE,
AND AN EXAMINATION OF THE CASES AT LAW AND EQUITY,
APPLICABLE TO IT; OR ILLUSTRATING THE DOCTRINE
OF COMMERCIAL FRAUD.

BY

W. F. FINLASON, Esq.,

BARRISTER-AT-LAW,
EDITOR OF "CROWN AND NISI PRIUS REPORTS," ETC.

LONDON:

STEVENS AND HAYNES,
11 BELL YARD, TEMPLE BAR.
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TO.

THE RIGHT HONOURABLE

SIR ALEXANDER JAMES EDMUND COCKBURN, BART.,

LORD CHIEF-JUSTICE OF ENGLAND,

This Report

OF A CASE IN WHICH HIS GREAT JUDICIAL QUALITIES

WERE ADMIRABLY DISPLAYED,

IS

MOST RESPECTFULLY INSCRIBED.



PREFACE.

It will probably be felt, both by the profession and the public, that there ought to be some correct and authentic report of the trial of the great case which has excited so much interest, and was even the subject of discussion in Parliament; and probably, also, most persons will consider that such a report might be conveniently introduced by a succinct account of the history of the case itself, which for four years has attracted so much attention, and also some comments on the law of a case which has been the subject of such protracted proceedings, both civil and criminal. Indeed, a report of the trial itself would hardly be intelligible without an account of the proceedings in Chancery, which preceded the criminal proceedings, and were referred to, both at the trial and at the preliminary examination at the Mansion House, and in which the Court of Chancery had acquitted the directors of all actual or intentional fraud.* One of the great points of legal, and one may almost say of constitutional, interest involved in the case is, the propriety of their committal for trial on a charge of fraud after such an acquittal by a superior court, and even a court of equity. In a legal point of view, the case involved many points of interest and importance both in a professional and public aspect, and every one will feel that, of such a case there ought to be some complete and authentic account. Probably no one would doubt that it

* Vice-Chancellor Malins so declared distinctly in his judgment, before the prosecution; the Lord Chancellor afterwards concurred in the opinion. (Gurney's case, 4 Law and Equity Reports, 715.)

has established, with the entire assent of the public and of the profession, the proposition that directors, whatever their errors may be, are not liable, civilly or criminally,* for fraud, if they have honestly believed in the probability of success, and in the substantial truth of the *data* on which their belief has been founded. Such a proposition, indeed, might have been predicated, from the previous decisions, both in law and in equity, and particularly in criminal cases; and it was only at a time of great public excitement, and amidst much popular clamour, that its soundness could have been doubted, or its application to the particular case denied. The writer had previously published reports of all the previous cases on the subject,† and a review of those cases will at once illustrate and uphold the present.

As regards the profession, it will be no doubt a leading case on the subject; and as regards the public, they may learn from the case the lesson so eloquently enforced in the luminous and admirable charge of the Lord Chief-Justice, to shun speculative enterprises; or, if they must embark in them, at all events to remember and apply the principle of the legal maxim, *caveat emptor*, and *take care to make inquiries*, instead of rushing headlong into speculation, trusting to others who may be honestly in error; and then, when they have encountered losses, rushing with equal imprudence into legal proceedings, hopeless or useless. It appeared, moreover, to the writer that there were other and particular reasons for a publication of a report of the case, accompanied by such comments upon it as might explain the law upon it; because it has been manifest from the first that it was very much misunderstood, by reason of some misunderstanding as to the law. That is, the law as to the nature of the obligations

* Some passages in the charge of the Lord Chief-Justice must not be taken to indicate that it was otherwise in actions for fraud, for he was charging a jury in a criminal case, and one of conspiracy, and had often laid down that in such actions there must be wilful or moral fraud—*i.e.*, a fraudulent representation known to be false; or not known to be true, and intended to deceive, but not necessarily (*i.e.*, in the former case) an actual intention to defraud. He alluded to other actions.

† From the case of the British Bank, the Queen v. Edgell and others, 1 F. & F.

or liabilities arising out of the business, and especially as to the sufficiency of assets, and the nature of insolvency, with reference particularly to a contract for the transfer of the business. When a case has for years occupied public attention, and is likely to be referred to hereafter as a "leading case,"—and there is reason to suppose that it has given rise to some misapprehension as to the law,—it is surely well that such misapprehension should be pointed out, not merely with a view to the injustice which may be done to individuals under an erroneous notion of the law, but also for the state of the law itself. In all cases which have involved great results, and have given rise to great public excitement, there is danger of such misapprehensions; and it is obvious, at all events, that in order to form a sound and just judgment upon a case, it must be considered through the light of sound and clear views as to the law. It has been the object of the writer to afford every aid in his power to the formation of such a judgment.

In more than one point of view, indeed, the prosecution in the present case was not only remarkable, but wholly without a parallel; and it is to be hoped its utter failure will ensure that it shall be regarded rather as a warning than a precedent. It was the first attempt to found a criminal prosecution on mere silence and supposed suppression; for as the Lord Chief-Justice observed, Never was there a prospectus more devoid of any actual misstatement, or even colour, or allurement. The utmost that it said was, that, in the opinion of the projectors, the enterprise was likely to succeed, which is no more than every vendor says; and the whole case for the prosecution was based on a supposed duty to disclose something which might have affected the judgment formed by the public upon it. How far there was any such duty is a question, even on the highest view of equity, of commercial morality, perhaps of wider and deeper interest than any other involved in the case, and upon which the writer has given the materials for a judgment by presenting all the cases in equity

on the subject. And even if there was such a duty in equity, the breach of it would not ground a criminal prosecution.

But there are several other points of view in which the prosecution was remarkable, and with reference to which a history of it will, it is hoped, not be without its use. There is one feature of the case in which it may, it is hoped, have a salutary influence as a warning for the future; and that is, as a sad illustration of the baleful effect of popular clamour in the administration of justice. It is one of the evils which attend the privilege of free discussion—(though, indeed, that privilege does not properly attach to a discussion of cases under litigation, particularly if the subject of criminal proceedings)—that a public excitement is easily raised; which is, while it lasts, fatal to justice. No one can doubt that, if it had not been for the enormous amount of the losses sustained in this case, a prosecution never would have been dreamt of, in such an utter absence of evidence of fraud; and that it was only the clamour excited by those losses, and the prejudice caused by that clamour, which could have given it a chance of success. Yet it is quite possible that clamour might have succeeded, had the counsel for the defence been less able, had the judge been less lucid, or the jury less firm. And if so—we have it on the authority of the Lord Chief-Justice of England, who quite concurred in the verdict of acquittal—that the conviction of the defendants would have been wrong, and that, as regarded three of them, it was *a prosecution entirely unjustifiable*. So nearly was a monstrous injustice being effected by means of popular clamour.

One more observation upon the many bearings of this remarkable case. It is this: that it illustrates the fallacy of the notion which has gained prevalence of late, that a magistrate is justified in committing a person for trial if he thinks there is a *chance* of conviction.* The writer

* It is sometimes so put unadvisedly even by counsel for the accused. This is almost the only excuse that can be made for the most upright and able magistrate, who com-

ventures to protest against this notion, as being (it is conceived) most mischievous and contrary to law. The law has always been, that a magistrate ought not to commit for trial, nor a grand jury find a bill, for a crime unless reasonably *satisfied* on the evidence, that, assuming it to be unanswered in law or fact, a jury must convict.* And the contrary view reverses a fundamental principle of the criminal law, and throws upon the accused the *onus* of proving his innocence, instead of upon the *prosecutor* of proving his *guilt*. It is a most serious thing to be committed to prison and put upon trial; it closes the mouth of the accused (as the Lord Chief-Justice more than once observed), deprives him of his liberty, and puts him at such a disadvantage, that unless he happens to be able to find good professional assistance, it necessarily places him in a position of great peril. No one can doubt that, partly owing to the error here pointed out, and partly owing to the influence of fallacies, diffused and enforced by popular clamour, great injustice was done in the present case. That the directors of the purchasing company were honest and independent was so abundantly shown, that the Lord Chief-Justice declared no one could have doubted it who was *not blinded by prejudice*; and he denounced the prosecution of these gentlemen as *the most unjustifiable proceeding he had ever known in all his experience*. And as it was admitted on all hands that the new directors knew as much as the others, it follows that (as the Lord Chief-Justice pointedly suggested), if there had been a public prosecutor, it is probable that such a prosecution would not have been instituted at all.

One further observation may be made on the cogent

mitted the defendants. One of the counsel, however, Mr Giffard, put the question in its true legal form, when he said that there must appear *reasonable ground* for believing there will be a conviction.

* Reasonable ground of suspicion is necessary even to authorise giving a person in charge to be brought up before a magistrate; and the committal by the magistrate only justifies the prosecutor on the ground of a legal presumption that the magistrate will exercise a sound judgment in requiring a *prima facie* case—which means a case that, unless answered, calls for a conviction.

illustration afforded by this case of the necessity for a *public prosecutor*. The Lord Chief-Justice observed, "that the case had deepened in his mind the impression, now amounting to conviction, that such an officer was necessary for the due administration of justice." This opinion also was expressed in the course of the parliamentary discussion of the case, which forms one of the most interesting incidents in its history; and there are few who will not concur in it.

No one will doubt that, of a case which has raised such varied and important questions, there ought to be a correct and authentic report, introduced by such a history of it, and such comments upon the law, as may be required to illustrate or explain it, and so to constitute a useful permanent record of it, and conduce to a just judgment upon its merits; and these objects it has been the writer's aim to satisfy.

It will be observed that the publication is inscribed to the Lord Chief-Justice, who so admirably tried the case, and who has kindly revised his summing up.

It was well that such a summing up should be preserved in an accurate and authentic form, and it is accordingly inserted *in extenso* with the corrections of the Lord Chief-Justice. It was a masterpiece of that judicial eloquence of which the Lord Chief-Justice is so great a master. There probably never was a finer display of the power of reasoning, or a more successful appeal to the sense of justice. Notwithstanding the weakness of the case, the power of popular clamour had been terrible, and for three years the current of public feeling had run strongly, and, as it seemed, hopelessly, against the accused. There can be no doubt that the masterly summing up determined the verdict, and (with every credit to the jury for yielding to it) deserves the merit of one of the most memorable victories ever achieved by the sense of justice over popular clamour and prejudice.

TEMPLE, January 31, 1870.

CONTENTS.

	PAGE
INTRODUCTION :—	1-98
History and Nature of the Case, ...	1
Origin and Nature of the Business, ...	2
Cases at Law and Equity as to Insolvency or Fraud in carrying on Business in contemplation of Insolvency, ...	12
Application of these Doctrines to the particular Case, ...	32
History of the Case, ...	32
Formation and Fate of the Company, ...	40
Causes of its Failure, ...	49
Proceedings in Chancery, ...	53
Criminal Prosecution, ...	63
History of the Prosecution, ...	63
Charge to the Grand Jury, ...	71
Discussion in Parliament, ...	83
Review of the Case, ...	95
 REPORT :—	
Indictment, ...	99
Opening of the Case for the Prosecution, ...	116
Evidence for the Prosecution, ...	121
Summing up the Case for the Prosecution, ...	174
Speeches for the Defence, ...	183
Summing up of the Lord Chief-Justice, ...	209



INTRODUCTION.

A PROSECUTION for conspiracy to cheat and defraud the public in the formation of a public company, must necessarily involve considerations of great public and professional interest; and when it has arisen out of matters which have for years been the subject of civil proceedings, it naturally invites an introductory review of the history of a case so remarkable.

Such a case, also, standing (as the Lord Chief-Justice pointed out) upon the confines of civil and criminal jurisdictions, and therefore illustrating their nature and distinctions; and, moreover, in this particular case, involving, by reason of its nature, considerations of singular complexity and difficulty, necessarily open to much misunderstanding, would appear likewise to require some preliminary review of the law on the subjects involved. This would be the more necessary if, as from the result of the case there would seem to be reason to believe, misapprehensions have actually arisen, likely to confuse the law, and obscure the right view of so remarkable a case.

It is obvious that, in forming a judgment upon any case of novelty, complexity, and difficulty, especially if it has involved great issues, and given rise to great public excitement, it is essential to approach its consideration with a clear and correct idea of the rule of decision, the *ratio decidendi*; in other words, the law upon the subject. Otherwise, in the absence of such a clear view of the law, the judgment formed, and the view taken of the case, will inevitably be erroneous.

The case related to a contract for the transfer of a mercantile and monetary business of modern origin, and of a peculiar character; and though the principles of law involved are of general application, yet in the application of them to such a transaction there was some difficulty, arising from the nature of the particular business, and therefore it is necessary to understand distinctly the nature of that business, and the obligations and liabilities arising out of it, especially as to sufficiency of assets to meet demands, and as to the legal definition of insolvency, particularly with reference to such a transaction as the transfer of the business with a guarantee of assets.

The case rose out of the transfer of the business of a firm of bill-brokers and money-dealers; and it is necessary, in order to understand the law as to the case, to understand the law as applicable to such a business. It is to be distinguished from that of a mere banker, though often united to it. The business, indeed (as a matter of legal or commercial history), appears to have arisen out of the exigencies of monetary transactions, with reference, on the one hand, to the nature of the business of mere bankers, and, on the other, to the manner of dealing with bills of exchange, in order to raise money upon them, either by discount, or otherwise, in the way of credit or advance. Ordinarily a banker, in the regular way of business, would not be bound to receive bills as cash, and he would enter them "short" (as it is called), that is, conditionally until payment, when of course the amount received would be credited as cash, and in such cases he would merely be agent to present and receive the bill. He might, if satisfied as to the bill, give credit for it at once as cash, in which case (if not taking them as holders and indorsee), he would only have a lien on the bills so dealt with, and could not deal with them.* If, indeed, bills indorsed in blank were deposited with a banker to be received when due, he might pledge them with other bankers to raise

* *Giles v. Perkins*, 9 East, 12.

money upon them,* but that would be because he was *holder of the bills*, and not merely as banker. In questions between bankers and their customers, they have been considered for some purposes, as factors; but this would not apply to *indorsed bills*, which the banker must take as holder, and deal with as his property. A banker who receives indorsed bills from his customers to get in when due, and carried to his account, may discount or sell them or pledge them. But that doctrine only applied where the banker bought the bills. In order to change the property, it would be necessary that the banker should have bought the bills, or discounted them (which is, indeed, the same thing), and then the customer would be entitled at once to the proceeds, less the discount, which would be the price to be paid for the bills; and if the customer did not indorse the bills, and they were afterwards dishonoured, the banker would have no remedy against him, but only against the parties to the bill. It was settled half a century ago that bankers, being factors for money, and receiving bills as agents, the mere fact of their receiving bills indorsed, and even entering them to the credit of their customers, unless actually discounted, would not enable them to deal with their customers' bills, by discounting them to raise money upon them, unless the usage and course of business allowed it. †

By indorsing the bills paid in, or giving a guarantee, the customer might enable the banker to negotiate the bills; but the banker could only be justified in negotiating them when it was rendered reasonable by the state of the customer's account—that is, to balance it by meeting advances, not for the purpose of the banker's own profit. And unless the custom was such as to authorise the using of the bills, the bankers would be liable to the penalties of the criminal law; for by a statute‡ it was enacted that

* *Collins v. Martin*, 1 B. & P., 648. A mere discount of a bill, without the indorsement of the party who receives the money, does not give the holder of the bill any claim against such party. (*Ex parte Roberts*, 2 Cox, 171.)

† *Thompson v. Giles*, 2 Barnwell & Cresswell's Reports, 428. That case was in 1824.

‡ 53 George III., c. 68.

bankers and others applying to their own use bills deposited with them for certain purposes, not involving the right thus to deal with them, should be deemed guilty of a grave misdemeanour. And it was considered that, if bankers disposed of bills in such a manner, *knowing themselves* to be on the eve of bankruptcy, they would be in danger under that act.* What would be insolvency, and what would be a knowledge of such a state, is a different question, and one not free from difficulty. For the present, the question is as to the authority of the banker to deal with the bills of his customer. And enough has been said already to indicate the convenience of a separate business devoted to the discount—that is, the buying of bills, and the dealing with them for profit. This, it is evident, was a business wholly different and distinct from that of a mere banker, and for that very reason it became *separate* and distinct. Nothing was more clear than that bankers, merely taking bills, not discounting them, could not treat them as their own;† and that merely placing the bills to the account of the customer did not enable them to do so;‡ and that, if he did not discount them, they remained the customer's, subject only to a lien for a balance due.§

And as the business of bill discounting was a business of itself, naturally enough, out of the exigencies of mercantile transactions, and on account of the vast amount of bills to be discounted, it rose into a separate and distinct business, that of bill-brokers, which necessarily involved in it the business of money-dealers; because the very distinction between it and that of a banker was, that it was the buying of bills, and therefore involved the right of dealing with them for the broker's profit. And it naturally came in some way to include the business of bankers; because of course money, the proceeds of bills discounted, would, for the sake of convenience, not be carried away in cash, but kept on account; and, on the other hand, the

* *Thompson v. Giles*, 2 B. & C., 437.

† *Ex parte Froggatt*, 7 Jurist, 510.

‡ *Ex parte Atkins*, 3 Mont. Dea. & De Gex.,

7 Jur., 63.

§ *Ex parte Edwards*, 2 Ibid., 625.

brokers would naturally receive money on deposit, at interest, to be employed by them in their business of discounting at higher rates, so as to realise a profit.

Hence arose the business of bill-brokers and money-dealers; as to which it was held many years ago, though in our own time, that "a bill-broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing; his duties may vary in different parts of the country, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place." * Therefore when the question arose, whether the bill-broker might deal with the bills of a customer for his own purposes, it was at first held that, as a matter of general law, "a bill-broker who receives a bill from a customer to *procure* it to be discounted, has no right to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and still less has he a right to deposit such bills as a security or part security for money previously due from him." † But this, it will be observed, was first laid down as the general law, independent of usage, and next it was laid down as to bills not discounted, but intrusted and received for the *purpose of getting* them discounted, and is an entirely different, nay, opposite kind of case. But when the case arose of bills not discounted by bill-brokers, but deposited for advances to be made or obtained upon them, and there was evidence of a usage of bill-brokers not merely to discount or pledge the bills of such customers by themselves for an advance on those bills only, but to pledge bills of various customers together for an advance upon all of one gross sum, or even to pledge them for antecedent advances, it was held a valid and legal usage, which bound the customer. It appeared to be the usage in the city for bill-brokers to raise money for their employers by pledging the bills of

* *Foster v. Pearson*, 1 C. M. & R., 858; Reports, 767.

† *Haynes v. Foster*, Crompton and Meeson's Reports, 237.

different proprietors for one entire advance. There was nothing unreasonable in it, and it was held good in law. This, it will be observed, only applied to bills not discounted; as to bills discounted or bought, the general law, it will have been seen, had already established their right of dealing with them or disposing of them as an assignment of a right of property in the bills. In that case the principles on which the business of bill-brokers depends were laid down, for it was said that "the usage gave facilities for the raising of money on negotiable paper; for it may well happen that a great capitalist would advance money in this way who would not discount each particular bill." *

Thus, then, the business of bill-brokers and money-dealers was established, as involving, not only, by the general law, a right to deal with bills discounted with them, but even, by usage, to deal with bills only intrusted to them to be discounted. And the principle upon which this was established affords a clear illustration of the law applicable to such a business. "It is observable that the question in the case being whether Messrs Foster acted with due care and caution, and in the ordinary course of business, in renewing these bills; how can it be said that the jury were wrong in finding as they did (*i.e.*, in their favour), when there was such a body of evidence to show that they acted precisely in the same way that bankers and other merchants of respectability were in the habit of acting,—men who must be presumed to conduct their affairs with ordinary care, and with due circumspection? What greater care can be required from any man of business? What different conduct can be expected from that which other men of business, of character, and of intelligence employ in similar transactions? What better criterion of ordinary care than that measure of care ordinarily used by other persons in the same department of trade similarly situated?"† So in another case, where the question was as to negligence, which sometimes is made

* *Foster v. Pearson*, 1 C. M. & R., 839.

† *Ibid*.

evidence of fraud. "The point to be determined is, not whether the defendant arrived at a correct conclusion, but whether, on the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, which appears to us to rest upon this further inquiry, whether other persons exercising the same profession or calling, and being men of experience and skill, would or would not have come to the same conclusion. If nine brokers out of ten would have done the same as the defendant did, under the same circumstances, or even if as many out of a given number would have been of his opinion, or against it, he would be entitled to a verdict in his favour." * The principle involved in these decisions appears to be, that in the conduct of such a business as that of bill-brokers and money-dealers, the criterion as to what is right and proper is the general usage in that species of business. It is necessary, with reference to the particular case, to consider this principle, and apply it, as to the obligations and liabilities arising, especially as to the obligation to provide sufficiency of assets, and more particularly with reference to insolvency.

It must be obvious, that if bill-brokers and money-dealers might deal with their customers' bills, *a fortiori*; they might deal with their customers' money, deposited with them on interest, for the very purpose of being dealt with, and interest being paid for it, for the purpose of so dealing with it. The interest, in the case of money, would be the price paid for the use of it, as the discount in the case of bills. In the *ordinary* case of a banker, it has been held that money deposited by a customer in a banker's hands is money *lent*, though with the obligation of repaying it when called for;† and so as to money on deposit delivered to a money-dealer on demand or notice. But then it is *money lent*, and money lent is money which may be dealt with—*a fortiori*, if it is received *at interest*.

* Tindal, C.-J., *Chapman v. Walton*, 10 Bingham's Reports, 64.

† *Pott v. Clegg*, 16 Meeson and Welsby's Reports, 321.

And bills discounted by a broker or banker might be rediscounted—that is, discounted again with other bankers or brokers (supposing the rate of interest would render it profitable to do so), and, if dishonoured, would be a liability, in the first instance, on the banker or dealer so discounting, but *then* on all prior parties.* So that the bill thus would be what is called a contingent liability—that is, a liability primarily of the banker or dealer who rediscounted, but not really or ultimately so, unless none of the prior parties were solvent; in which case alone the money-dealer would have to bear the loss. So that, if a customer, after paying in bills, fails, his banker or dealer may prove against his estate for the whole amount; and then, if the bills are paid by any of the other parties, the proof is reduced to that amount.† But if the banker or dealer receive money or cheques from a customer, knowing that his bankruptcy is inevitable, it is a fraud, in an equitable point of view, and he cannot avail himself of the money.‡

But here the question arises, What is a knowledge that bankruptcy is inevitable? which involves the question, What is insolvency? and indirectly involves the question of liability of money-dealers as to sufficiency of assets to meet demands of their depositors.

Now, this is one of the most difficult questions to determine in point of law, since it depends so much upon matter of fact, and on the nature and usages of a particular business, and the demands likely to be made upon it. The very term insolvency is (as has been pointed out by judges) ambiguous; for it may mean merely that a dealer or banker cannot pay, at the moment, all his debts at once, though he has plenty of assets to enable him to meet the whole, if he has reasonable time to realise them.§ And it was long ago settled that this is *not* necessarily insolvency; at all events, in any such case as to render it the

* Pollard v. Ogden, 2 Ellis and Blackburn's Reports, 459.

† *Ex parte Hornby*, 1 De Gex, 69.

‡ *Ex parte Case*, 3 M. D. & D., 189.

§ *Fidgeon v. Sharpe*, 5 Taunton's Report.

duty of the trader to deem bankruptcy inevitable: as where traders had many thousands of pounds locked up in distant assets, but believed that their creditors would give them time to realise the assets. Or, again, insolvency may mean that a man is in such a state, that he must know he cannot pay his creditors, as he has not assets equal to their claims; and in either sense of the term, it is manifest that this involves, in a great degree, a question of estimate and valuation as to the amount or value of the assets, and that this must necessarily be more or less a matter of opinion; so that it is virtually a question of honest or reasonable belief. Hence, in one case, it was said by the Court—

“There is a circumstance to be taken into consideration, which is, the manner in which the debtor estimated the value of his own property. We have an account of the state of the property, and what it produced. But his estimate of the property might be—and according to his own account was—very different from what is represented as the result of it. If he was an active and sanguine man, not easily restrained, the question would be, whether, with that disposition, he knew or believed that his affairs were about to end in bankruptcy. It is hardly fair to think that we are judging upon the same facts that were presented to the bankrupt's mind; because it is one thing to see a matter when brought together, and another thing to see it, as the bankrupt would do, as the result of re-examination of many various matters. It is by no means improbable that he might have considered his affairs not hopeless when he *looked at a large mass of concerns surrounded with circumstances which would throw around them confusion, doubt, and uncertainty, which we ourselves do not see*. It is highly probable that he might adopt another and exaggerated view of his property.”*

And, again, it has been laid down that, “from a person being in embarrassed circumstances, it does not necessarily follow that he contemplates bankruptcy, as he may hope that his affairs may rally and come round.”† And it has repeatedly been held that it is not an abstract question of law, but a question eminently of fact, dependent upon all the circumstances of the case, especially the nature of the business, the estimated value of the assets, and the probability of immediate pressure, and not merely on the bare

* *Beicher v. Prittle*, 10 Bingham's Reports, 401.

† *Green v. Bradfield*, 1 Car. & K., 149.

abstract amount of the liabilities, as compared with the amount of ready money to meet them.*

Here the question would arise, with reference to the particular business of money-dealer, what would be the liability, as to sufficiency of assets, to meet demands of depositors on the one hand, or creditors on the other. That is, for money deposited at interest, or due as money lent or advanced. Here, again, it would be necessary to draw a distinction between these two heads of liability; for, obviously, an ordinary debt for money lent, due, and payable, is very different from money deposited at interest for the purpose of being dealt with; and which, though in a strictly legal sense, money lent, is still money lent under a special and peculiar contract, which involves no liability to repayment until after demand and notice of withdrawal; which may not be made for years; whereas a mere ordinary debt for money lent, is ordinarily, unless secured, repaid so soon as it is due. It would be obviously impossible to carry on the business of a money-dealer to advantage, if these two heads of liability were treated as identical. For it would come to this, that the money-dealer would have to keep the money he paid interest upon always ready—the whole of it—for immediate repayment upon demand. No doubt the money-dealer, like any other trader, would be bound to have a sufficiency of assets to meet or balance all demands, but not to meet them all immediately, and at once. That is, he would be bound to have assets equal in value and amount; and if he had, he would be solvent, provided, at all events, he also had ready assets to meet all ordinary demands,—that is, all demands which, from the nature of his business, were likely to be made, until he could realise his other assets. In the case of a banker, or, at least, a money-dealer, this would mean that he had ready assets sufficient to meet the amount of arrears due and payable on loan, and the amount of deposits ordinarily likely to be with-

* Gibson v. Muskett, 3 So. N. S., 419; Cook v. Prichard, 5 M. & G.

drawn, after allowing for other deposits ordinarily renewed. In other words, the assets ought to equal in value and amount the whole of the liabilities, and the ready assets the ordinary amount of current or instant liabilities, with some reasonable margin for some excess of demand.

Such seems the conclusion deducible from legal principle, or from the analogies afforded by cases as to other businesses; and a money-dealer in such a position could not, it is conceived, fairly be considered insolvent. These, however, would be the principles applicable to the question supposing that in any case it became material—whether in equity or in bankruptcy (which is a species of statutable equity), or in common law, civil or criminal—to consider how far a money-dealer had been, at a particular period, in such a state of insolvency as that he must have deemed bankruptcy inevitable, and his continuance of the business, or disposal of it, under a guarantee of the sufficiency of his assets—in an equitable point of view—fraudulent. That it would not be so, in a legal point of view,—even in a civil proceeding—without an express representation wilfully false, is, it is conceived, too manifest to require demonstration; but, as in the recent case it was unaccountably conceived to be otherwise, it will be necessary to consider the law upon that subject: namely, as to what constitutes fraud in a legal or equitable point of view, with particular reference to the question which has just been considered: as to the sufficiency of the assets of a money-dealer to entitle him either to continue his business, or to dispose of it, under a guarantee of the sufficiency of his assets.

Now there can be no doubt that in a court of law a *wilful* misrepresentation of a matter of fact—*i.e.*, a representation known to be false by the party making it, to the prejudice of the other party—will sustain an action,* as in the ordinary case of the sale of a business, if the amount of the profits be wilfully misrepresented, as a matter peculiarly within the knowledge of the party disposing of the

* *Dobell v. Stevens*, 3 *Barnwall and Crosswell's Reports*, 624.

business, and a mere matter of fact. And the law would be the same if he did not know the amount of profit, and falsely represented it with intent to deceive. But we never heard of an action for not stating the amount of profits, or even for not stating that no profits were made at all, for the maxim, at law is, *caveat emptor*: let the buyer take care and inquire. If he is told falsehoods, then he has a right of action; but if he makes no inquiries, at law he has no remedy, though he may in equity. This is the distinction between fraud in the legal and equitable sense, though even in equity there is no fraud in mere non-disclosure unless there is a duty to disclose, which there is not if the parties are in a position of equality in the transaction—that is, of equal knowledge and means of knowledge; and the doctrine of equitable fraud would only apply to matters in the knowledge only of the vendor, which he ought to disclose to the vendee. With regard to actual wilful misrepresentation, there appears to be no material difference between equity and law. Either in law or equity such misrepresentation affords a right to redress.

Many years have elapsed since the same principle, with its essential qualification, was laid down and applied in the case of misrepresentations by directors of joint-stock companies to shareholders, if *wilfully* false and fraudulent. Thus it was said by Lord Campbell, C.-J., in such a case: "We consider it to be clear law, that if A fraudulently makes a representation which is false, and *which he knows to be false*, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action against A for the deceit." * And that was laid down and applied in a case where the directors had represented that there would be a *minimum* annual dividend of £33 per share, knowing that it was a bubble company, and that no dividend could ever be paid at all. Here, it will be observed, it was distinctly

laid down that the representation must be *wilfully* false; and in this particular case it was so.

And so in a court of equity fraud, in this sense, means *wilful* misrepresentation,* to the deception and injury of another. Thus the doctrine, in affirmance of a case at law, was thus laid down by the late Lord Cranworth—

“It may be impossible to give a definition of what constitutes fraud in the contemplation of a court of equity, or to meet all the various combinations of circumstances to which the word may apply; but there can be no difficulty in saying that, whenever any one has, by *wilful misrepresentations*, induced another to part with his rights, on the belief that such representations were true, this is, in the plainest and most obvious sense, a fraud, which this court will not tolerate. Once make out anything like deception—intentional deception, and no contract resting in any degree on that foundation can stand.”

Upon these principles, if several persons enter into a contract to purchase a mine or a business, which they have agreed to sell to a company, and some of them were deceived by the others, in league with the vendors, and they issued a prospectus based on the supposition of the facts being as represented to them, and entered into the contract on that basis, a court of equity would set aside the contract and decree restitution, on the ground that the company had a right to the best bargain, which the members of the committee, had they known the facts, would have been in a position to give them.† And so, if a banker disposing of a business misrepresents the profits to a purchaser or partner, not knowing the true amount, the purchaser, at law, or the partner, in equity, has a remedy.‡

Even, however, in equity, mere concealment or non-disclosure of a matter within the knowledge of one party, in a transaction to the other, is not deemed to amount to fraud, unless, not only it be material to and connected with the transaction, but unless, also, there be a duty upon the party withholding it to communicate it. Thus, where one of two parties to an adventure received letters about it which he

* *Regnell v. Sprye*, 21 Law Journal Reports, Chancery, 657.

† *Beck v. Kantowic*, 3 Kay and Johnstone's Reports, p. 30.

‡ *Rawlings v. Wickham*, 28 Law Journal Reports, Chancery.

did not communicate to the other, a court of equity held that there was no obligation to communicate the letters, and that, there being no proof of misrepresentation, the contract could not be set aside merely on account of the non-communication.* Even in the case of a surety, it is not a consequence of that relation that the creditor is bound to communicate to him everything material he is aware of.† Concealment must be fraudulent to make out a case even for equitable relief.‡

At law, as already seen, misrepresentation is required to support even a civil proceeding, and of course still more so as to a criminal proceeding. It has been held that, in a conspiracy to defraud, the fraud, so to speak, must be a total as well as wilful misrepresentation §—that is to say, it must be a deceitful representation, *entirely* false, as well as *wilfully* false. Without that, an indictment for *conspiracy* could no more be maintained than an action for fraud or a count for cheating,|| as where the conspiracy was to defraud by means of bills which it was known by the parties the pretended acceptor had *no funds* to meet when due. And so, of course, if the bills were forged. So where the buyer of a horse and another person conspired together by a specific false statement of unsoundness, and re-sale, in consequence, at a lower price, to induce the seller to take less than the original price. So of course it would have been had the case been the other way—that is, the vendor trying to induce the buyer to give a larger price. These cases clearly show that even a count for conspiracy would require false representation.

And it has been held that a party obtaining money from another upon the most exaggerated representations as to the value of a business, which, or a share in which,¶ he disposes of to the other, cannot be indicted for the fraud,

* *M'Leure v. Repley*, 2 Macnaghten and Gordon's Chancery Reports, 274.

† *Wyllers v. Labouchere*, 3 De Gex and Jones' Chancery Reports, 597.

‡ *Pledge v. Bass*, Johnson's Reports, 663.

§ *Regina v. Gomperts*, 9 Queen's Bench Reports, 826.

|| *Queen v. Carlisle*, 9 Dearsly's Crown Cases, 837.

¶ *Bex v. Watson*, 27 Law Journal, Magistrates' Cases, 281.

unless the whole scheme is a sham, and the business merely a pretence of something really not existing. Thus, where a person induced another to enter into partnership with him upon the most gross and exaggerated misrepresentations of the value of a business, which in truth was extremely small, it was held that he could not be indicted, because his representations (as Cockburn, C.-J., put it) were not altogether false, and there was a business and a partnership in it, and because (as Erle, C.-J., put it) an indictment cannot be sustained by proof of mere exaggeration of the prosperity of a business where there is a business. It is difficult to draw a defined line, but it has been decided that exaggerated praise does not render a person liable.

On the same principle, in a still more recent case, reported by the writer,* it was held by a very learned judge that a false representation as to the value of a business will not sustain an indictment for obtaining money under false pretences. The learned judge said—

“It is like the case of a sale of a business upon such a representation—i.e., that it was a good business. No doubt, if the business was worthless, there was a gross exaggeration, probably fraudulent; but is it a case for an indictment for obtaining money by false pretences? If so, an indictment would lie in every case of a false and fraudulent representation of the value of a business.”

The conclusions to be drawn from these authorities will be found to have been amply borne out by the numerous cases on the subject which have occurred of late years. For instance, in the *British Bank* case in 1858,† the basis of the charge was *false representation* of the solvency of the bank, and the indictment alleged—

“That the defendants, intending to deceive and defraud, conspired together falsely and fraudulently to represent that the bank and its affairs were in a sound and prosperous condition, producing profits divisible among the shareholders, they well knowing that the bank and its affairs had been, and were, in an unsound and unprosperous condition, not producing any profit divisible among the shareholders.”

And the overt acts alleged were such as *issuing a fraudu-*

* *Regina v. Williamson*, 21 Law Times Reports, N. S., 444.

† Reported by the writer—*Regina v. Eadalle*, 1 Foster and Finlason's Nisi Prius Reports, 212.

lent balance-sheet, &c. A great body of evidence was adduced to show that, to the knowledge of the directors, the balance-sheet was deceptive: that the bank was in circumstances which made it incapable of fulfilling its engagements. The deception was chiefly effected by including in this *published* balance-sheet debts known to be desperate, without any intimation that they were so, nor any adequate reserve for bad or doubtful debts. It was held, of course, that that and other similar evidence was sufficient to sustain the charge as against all the directors, who, being aware that this was the state of the bank, concurred in *issuing* the fraudulent and deceptive balance-sheet. It was also held that it would be sufficient to sustain the charge to show that they knew the bank to be insolvent, and concurred in putting forth to the public such fraudulent representations that it was in a sound and solvent state; and that if they knew that debts hopelessly bad were included among available assets, without any countervailing reserve or provision for them, that would be evidence of fraudulent intention. As to the fundamental fact of insolvency, however, it is to be observed that the Attorney-General, in his particulars of the charge, defined it thus—

“The carrying on the business of the bank after its reserved fund and more than one-fourth of its paid-up capital had been lost, and even after *the whole* of its capital had been lost.”

This, it is manifest, was a total and actual insolvency about which there could be no mistake; and the mere continuance of business in such a state, and representing it as profitable, was no doubt a gross fraud. But, from the very manner in which the charges were framed, it is apparent that the law-officers of the crown did not conceive that mere doubtful or possible insolvency, arising, not from a deficiency of property, but from a deficiency of assets ready and convertible, would have sufficed to sustain the charge, or that it would be fraudulent to represent as assets debt not hopelessly bad. In that case,

moreover, Lord Campbell permitted a witness to be asked as an "expert," what were "convertible" securities, and the witness pointed out that securities might be good though not convertible, and that even fixed property, like mines, might be convertible as well as good. And he added this: "Everything owing to a bank is assets: a hopeless debt would be bad assets, and a good debt" (i.e., one not hopeless) "would be good assets." At the close of the case, Lord Campbell thus explained—

"In support of the charge of conspiracy it is sought to show:—1. That the bank was insolvent. 2. That this was known to the defendants. 3. That they nevertheless entered into a design to represent that it was in a prosperous state. 4. With intent to deceive and defraud the shareholders and the public."

Lord Campbell laid down distinctly—

"You must bear in mind that mere proof of improper conduct upon the part of the defendants will not sustain the charge; for instance, their having gone on after the one-fourth capital and reserve fund was exhausted. The charge is, that they *conspired to misrepresent the actual state of the bank for the purpose of deceiving* and defrauding the shareholders; and to establish that, there must be proof of a joint design, a joint combination and conspiracy."

Lord Campbell went on to point out, that if assets, *known to be hopeless*, were represented to the shareholders as good, it would be evidence of fraud; so *circulars representing the bank as solvent if known to be insolvent*; and he pointed out that, if *the books were falsified*, it would be no excuse that the balance-sheets corresponded with the books; and he concluded thus—

"It is for you to say whether the *balance-sheets* were not *falsified* to deceive the public, to conceal the true state of affairs, and to delude persons into purchasing shares."

The defendants, in that case, were convicted; but it will be observed that they were convicted of *actual misrepresentations, wilfully false*, and that they were convicted of *putting forth* to the public and the shareholders *fraudulent balance-sheets*, founded on *falsified* books, representing a concern to be solvent and profitable when they knew it

to be totally insolvent, and representing debts, known to be desperate and hopeless, as good for the full amount. All this was represented by them to the public by means of fraudulent balance-sheets put forth to the public. It would be impossible to conceive a clearer or stronger case of actual fraudulent misrepresentation, to the *public*, of *facts* within the knowledge of the defendants.

But about the same time it was laid down that, even to sustain an *action* for false representation, there must be representations wilfully false, and false representations of specific facts. Thus, in an action for falsely representing the value of a business, it was proved that the defendant represented the profits were so much when they were not half as much; nevertheless, as it appeared that the books were produced, and there was no other than mere general evidence that the amount of profits was known to him, Mr Justice Willes held this was no case for the jury, and said—

“There is no proof of a warranty that the house was doing a certain amount of business, and, therefore, to sustain the action, it would be necessary to show that the defendants made false statements fraudulently and intending to deceive the plaintiff. *Mere general commendation of the business is nothing*, and even as to a representation that it is of a particular amount, there must be some proof that it was fraudulent.” *

So, in a similar case, that shrewd and sensible judge, the late Mr Justice Crompton, said—

“This action is founded entirely on fraud—that is, *wilful falsehood*. Negligent or careless exaggeration will not suffice to sustain it: there must be fraud, and fraud must be satisfactorily shown, and is not to be lightly presumed. It is to be assumed, apart from fraud, that the seller will somewhat overestimate the value of what he sells, and the buyer will make allowance for exaggeration.” †

It is hardly necessary to say, that on an indictment for obtaining money by means of false pretences, it must be proved that the pretences were wilfully false, and intended to defraud.‡ The important point to be observed is, that even an *action* cannot be sustained for false representation

* Collins v. Gripper, 1 Foster & Finlason's Reports, 332; Wood v. Keep, *Ibid.*

† Huntingford v. Massey, *Ibid.*, 690.

‡ Coleridge, J., Reg. v. Cooke, *Ibid.*, 67; Reg. v. Buttam, 3 F. & F., 465.

unless shown to have been *wilfully* false. This has been lately illustrated by several cases against directors of companies. Thus, in an action, Mr Lush—now Mr Justice Lush—gave up the case against directors not proved to have *known* the falsehood of the representation.* In another case, the late Lord Chief-Baron, Sir F. Pollock, said—the representation having been as to the value of shares—

“A case of fraud requires very careful consideration, and the great question is, whether the representation is shown to have been not *bona fide*, &c. In the absence of such evidence, there is not sufficient evidence to convict the defendant upon a charge of fraud. It ought not to be left to mere suspicion, suggestion, or surmise. There ought to be clear proof of fraud. The defendant may, for aught that appears, have believed that the shares would maintain their worth or value.” †

So, in a still more recent case, the present Lord Chief-Justice said—

“The *mens dolosa*—the fraudulent intention—is the foundation of the action; and if the jury believe that these gentlemen, though aware of the prospectus, had no knowledge of the falsehood of any statement in it, and, on the contrary, believed it to be the truth, the action could not be maintainable.” ‡

And the Lord Chief-Justice afterwards, with characteristic clearness, explained the case more fully in these terms—

“This is not an action upon a warranty, or for a failure of consideration, but upon an alleged fraudulent representation in the prospectus. It is necessary, first, that there should have been a statement, false, and made without an honest belief in its truth. If a man makes a statement as to which he has neither knowledge nor belief, and makes it for the purpose of deceit, that is fraudulent. But if a man makes a statement he believes to be true, though it afterwards turns out to be false, he is not liable for false representation. If it were not so, men would be daily liable for misrepresentations, honestly made and believed to be true, but which turned out to be untrue. Therefore, the question will be, whether the defendants put forward the representations in the prospectus with a belief in their truth.”

That, be it observed, was a case of actual *representations* to the public, and representations of specific facts, and representations as to which a great body of evidence was

* *Bale v. Clelland*, 4 F. & F., 154.

† *Gray v. Collins*, 4 Foster & Finlason's Reports, 310.

‡ *Moore v. Burke*, *Ibid.*, 280.

adduced to show that, in point of fact, they were untrue ; yet the Lord Chief-Justice laid it down as clear law that the defendants would not be liable, even in an action, unless the representations were wilfully false, or put forth *without* an honest belief in their truth. Then the Lord Chief-Justice proceeded to instruct the jury as to the true *ratio decidendi*. The mode of determining the issue he thus presented to them—

“ We start with the fact that it was not a bubble company or a swindling scheme. It was an honest enterprise in its origin, and, but for unforeseen and unfortunate events, it would have proved extremely profitable. This is a strong fact in favour of the defendants. And you must remember, in considering the evidence as to the various heads of alleged misrepresentation, that you are not trying whether these statements were strictly true. This is a case in which the parties are charged with statements false and fraudulent, and you must consider the case, not as lawyers, but as practical men—not in a technical point of view, but with reference to what is substantial and real.”

It would be impossible to imagine an exposition of the law clearer or more correct, and this is the law even as to *civil* proceedings. Of course the law as to criminal proceedings is not *less* liberal ; and, though a charge of conspiracy may be maintained where the object is unlawful, as to cheat or defraud, and the *means* are unlawful, it is clear that they must at least be unlawful—that is, such as, if damage ensued, would sustain an action. This conclusion is supported by several recent cases as to conspiracies by directors or others to cheat and defraud. Thus, in the recent case in 1865, on an indictment of wharfingers for a conspiracy to defraud insurers by false statements as to goods deposited with them, the indictment charged a conspiracy by means of statements wilfully false,* and the judge held that both these matters were required to support the charge of making false claims, and *conspiring* to do so ; and, as the proof of the latter failed, he directed an acquittal. He said—

“ The law, no doubt, is, that a wrongful act may not be indictable if one

* Reg. v. Barry, 4 Foster & Finlason's Reports, 390.

person only commits it, but that, if two or more persons conspire together to do a wrongful act, it is indictable."

That is, an act which, if it caused damage, would be *actionable*, although perhaps not *indictable*. There is no other definition of a wrongful act. Thus, a man cannot be indicted for a simple *lie*, although, if it causes damage, he may be *sued* for it; but if two conspire together to cheat and defraud by means of falsehoods, then, as the falsehood, followed by damage (which is the object), is wrongful, they may be indicted. So, in a recent case of indictment against the manager and secretary of a joint-stock bank (the Unity) for conspiracy, to deceive and defraud the shareholders, *by means of false balance-sheets*, it was charged that the balance-sheets were *wilfully* false, of which there was evidence, and yet the charge failed, from want of sufficient evidence of a *conspiracy* to issue such balance-sheets. And the learned judge, Mr Justice Smith, put the case thus—

"It is a question for you whether you think it was done with an intention to deceive. In order to find the defendants guilty, you must be convinced that they intended to deceive the auditor and shareholders." *

No doubt it has been held by the House of Lords, that if the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished.[†] But there a joint-stock marine insurance company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company: and the agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company, and the person to whom he so mentioned them became afterwards a purchaser of shares.

* Reg. v. Busch, 4 Foster & Finlason's Reports, 420.

† Burnes v. Pennell, 2 H. L. Ca., 497; 13 Jur., 897.

That, it will be seen, was a case of deliberate fraud and intention to deceive, which the jury negatived in the present case. But the question in the present case was rather put as one of non-disclosure than misrepresentation. Even in equity, however, it is seldom, if ever, that the mere non-disclosure of a matter is deemed fraudulent or unfair, unless it is a matter which enters into the nature or value of the thing contracted for; and is contrary to some express or implied stipulation with regard to it. As, for instance, if land is described as fit for building purposes, and something is concealed which renders it unfit for it,* or if it is declared that a sale is to be without reserve, and there is an arrangement for a bidding up the price.† Thus, for example, where the thing sold is represented as one thing when it is not so, and is quite different.‡ This, indeed, is as much a legal as an equitable principle. Upon this principle, if a bill be sold, that is, discounted, it is understood to be warranted as genuine; so that if it be forged, the discounter can recover the whole amount from the party who has had it discounted.§ This was held not many years ago in the case of a bill discounted by Gurneys for a bill-broker, who himself had it for discount, and had got it discounted by them—he, not being a party to the bill, not having indorsed it. Yet he was held liable to Gurneys for the amount, on the principle of implied warranty. Upon this principle, in a sale of assets, it would be implied that they were *genuine*, but not that they were *good*—that is, to the full amount. And warranty, being matter of contract, excludes fraud in the matter, unless there is actual falsehood about it. Even in equity, where the rule as to concealment or non-disclosure of facts by one party to another in a transaction, is so strict that it goes far beyond any rule of law, and appears to extend as far as any obligation of morality; so that it has been held in the House of Lords that, in the case of suretyship, non-

* Shackleton v. Sutcliffe, 12 Jur., 199.

† Robinson v. Robinson, 2 Ph., 372.

‡ Stanton v. Tattersall, 1 Sm. & G., 529.

§ Gurney v. Womercley, 4 E. & B., 139.

communication of circumstances affecting the situation of parties material for the surety to be acquainted with, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself; yet there it was also laid down that even a surety is not of necessity entitled to receive, without inquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. And if he requires to know any particular matter, he must make it the subject of distinct inquiry.*

No doubt, concealment that is intentional and fraudulent—non-disclosure of something which, in the very nature of the thing disposed of, destroys its value—is sufficient to set aside a contract in equity. Thus an estate having been sold, some part of which was subject to a right of way, which circumstance was known to the vendor, but was not disclosed by the abstract, and was unknown to the purchaser, the contract was rescinded.†

But the concealment must be fraudulent; and in the House of Lords, a bill by purchaser to set aside a sale and conveyance on the ground of fraudulent concealment of a fact alleged to be known to the vendor was dismissed, no personal fraud, on the part of the vendor, being established. And it was there held, that, in support of a charge of fraudulent concealment, no case of constructive notice of the fact alleged to be concealed could be set up.‡ That is, it is not enough to show the knowledge of the fact by mere inference, especially when the fact itself may be matter of dispute, as where it is a question of insolvency, which may admit of considerable doubt, according to the sense in which the term is understood. And if the purchaser has even a general knowledge of the matter, he is expected to inquire, if it is not for the vendor to volunteer information. Thus where a purchaser of a perpetual rent-charge had notice of a deed making his vendor tenant for life of the lands on

* *Rallton v. Matthews*, 10 Cl. & F., 684.

† *Gibson v. D'Ester*, 2 You. & C. C. C., 642; 8 Jur., 94.

‡ *Wilde v. Gibson*, 12 Jur., 627—H. L.

which the rent was charged, and of the subsequent deed, whereby the vendor, suggesting that he was seised in fee of the lands, purported to convey them in fee, in consideration of the perpetual rent-charge:—Held, that he was bound to inquire into, and had notice of, the circumstances under which the latter deed was executed.*

According to a well-known rule of equity, a party purchasing is presumed to have notice or knowledge of all facts of which he could have had knowledge, if he had chosen to inquire, provided enough is known or disclosed to put him on inquiry. Thus it is a rule that the purchaser of an estate, stated to be subject to leases, is presumed to have known the nature of the leases; as he might have known them if he had chosen to ask for them. So on this principle it is plain that the purchaser of a business known to have made some bad debts must be presumed to have known the amount; as he might have known if he had asked for the accounts. And so in the present case, where the prospectus, on the face of it, disclosed that there was to be a guarantee against losses on assets transferred. It was for the shareholders to ask the amount.†

Hence also it is a principle in equity that a party relying on his ignorance of facts, must show not only that he had not the information, but that he could not with due diligence obtain it.‡ And that was held, even in the case of a surety, who, it was laid down, as he had the means of knowledge, must be taken to have had the knowledge he could have had. And in the case of the purchase of a business, the accounts being accessible, if asked for, this principle appears to apply in the absence of any false representation of a specific nature, such as to deter from inquiry.

There are other cases, however, which afford a still nearer and closer analogy to the present, and a better and

* *Roddy v. Williams*, 3 Jones & Latouche, 1.

† *Pope v. Garland*, 4 Y. & C., 304.

‡ *Watson v. Waring*, 15 Beavan's Reports, 161.

stricter standard of commercial morality, and with which, therefore, it may be well to compare it. Those are the cases as to certificates on bankruptcy. Where a bankrupt is proved to have been guilty of falsehood or dishonesty with reference to his creditors or his affairs, he is not entitled to his certificate; and if he has acted with any degree of impropriety, it can be censured, either by the grade of his certificate, or by withholding it for a certain period. And the court, in cases of certificate, has regard not only to the bankrupt and his affairs, but to the interests of society.*

Now, undoubtedly, it has never been deemed proper conduct in a trader to continue in business to receive other persons' money or goods, if he knows he is insolvent in the sense of not having assets in value equal to his debts, though, as already seen, if it is only a case of assets temporarily locked up, or if there is private property sufficient, if only realised, to make up the deficiency, and it is only a question of time, and he can get his creditors to give such time, it may be quite fair to go on; and, in such a state of things, it may be, in an ordinary case, probably usual to call the creditors, or their representatives, together, and lay before them the state of affairs, as in a case † where bankers thought it proper to make a temporary suspension of their business, and called together their creditors, who resolved—

“That it appears that the assets of the bank and the private property of the partners (all of which is available) afford ample means for discharging all the liabilities of the bank, and leave a surplus, after making every possible allowance for the possible depreciation of such assets or property.”

And, in such a case, supposing no necessity to stop; and supposing, also, any good reasons for not calling creditors together (which might, under some circumstances, be a dangerous measure, especially in the case of a bank, and tend to a panic), there would have been no impropriety in continuing the business, even *without* calling

* *Ex parte Dobson*, 6 De Gex, Macn. & G., 1781; 25 Law Journal Reports, Banky., 17.

† *Watts v. Christie*, 11 Beavan's Reports, 546; 18 Law Journal Reports, Ch., 178.

them together, which would only be a measure of prudence, in order to *secure* the necessary time. And, even if such a course were necessarily proper, under such circumstances, it could only be so in the case of a banker, from the peculiar nature of the business of a banker, and because, as the court said in that case, "customers have, or ought to have, their balances at command," and because, in the case of money, on the ordinary drawing account at a banker's (interest not being ordinarily payable for that reason), the obligation on the banker is to have the money of his customers always ready for them, though even then, probably, the usage of most bankers is only to have cash or convertible securities ready to meet ordinary demands. But, at all events, that principle would only apply to a banker, on account of the peculiar nature of his business, and would not with equal stringency apply to a money-dealer, who has money deposited at interest. And it has often been held, even in equity, and in cases of bankruptcy, that a transaction is not impeachable if it was honest, merely by reason of insolvency, in the sense of some deficiency of assets, provided there was not such a deficiency that bankruptcy must have been inevitable, and therefore in contemplation.* Where, indeed, a man carries on and continues business, knowing not only that he is, in that sense, insolvent, but that there is *no reasonable expectation of getting over his difficulties*, that is, no doubt, deemed misconduct in the view of a court of equity or bankruptcy.† And a trader carrying on business for years with a deficiency of assets ought to explain that circumstance, or give some fair excuse for his conduct, if any creditor has suffered for it, which, however, implies that even in that case it might be explained or excused. In that case, the late Lord Justice Knight Bruce said—

"It has been alleged, and truly, against the bankrupt, that, for more than three years before his bankruptcy, he was continually in such a posi-

* *Meggison v. Forster*, 12 Law Journal Reports, Chancery, 416.

† *Ex parte Darnford*, 20 Law Journal Bankruptcy Reports, 7.

tion that all his assets, if realised, would have amounted to less than his debts, and that he, nevertheless, continued to carry on trade all that time. This is a fact requiring explanation, but is not of itself conclusive. To say nothing of the wide mischief often caused by a sudden stoppage to creditors themselves, a man may continue to carry on his trade, in such circumstances, with good intention and firmness. He may have a well-grounded expectation and a reasonable hope of surmounting his difficulties. Such a course may be likely to be beneficial to existing creditors, and may be pursued without dishonesty. But each case must depend on its own circumstances."

The Lord Justice then cited a case in which the great objection was, that the firm had, for a considerable time, continued its trade when its assets were less in amount than its debts; but it appeared that the trade had not been carried on dishonestly, or with a bad motive, or desperately, but in the reasonable hope of surmounting the difficulties of the firm, and of paying the creditors in full. And then he went on to distinguish that from the case before him, where, as he considered, there had been *no such hope*, and therefore that the bankrupt was bound, before he obtained loans of money, to inform the creditor of his position. That is, because there was a great deficiency of assets over debts.

So in a case where bankers who knew that they were deeply insolvent continued to receive deposits for a long time, during which their assets would not have paid five shillings in the pound.* But, in that case, it is remarkable how strongly both the learned judges, Lord Cranworth and Lord Justice Knight Bruce, proved that the insolvency was hopeless, or, as Lord Cranworth expressed it, "desperate," and well known to the banker. Lord Cranworth said—

"The question is, Did the bankrupts continue to carry on their business as bankers, when they must have *known* that they were *hopelessly insolvent*? It is impossible to say that they did not."

That is, knowing not only their insolvency, but the *hopelessness* of their insolvency. And Lord Cranworth went on to explain what he meant by this.

* *Ex parte Rafford*, 21 Law Journal Reports, Chancery, p. 22.

“Looking at the case in the most favourable light, they continued, as bankers, to receive deposits, knowing that if their whole affairs were wound up, there would not be more than five shillings in the pound; and that, I consider, conduct wholly unjustifiable. They knew that they had not above five shillings in the pound, and having ascertained that, they went on continuing to receive deposits from rich and poor, with a perfect knowledge that if all demands were made on them at once, there was not the remotest chance of paying them in full.”

This, be it observed, was spoken of bankers, who, from the nature of their business, are bound to have their customers' money ready for them on demand; which is not true of money-dealers, at all events, to the same extent. So Lord Justice Knight Bruce said—

“The question is, Is it or is it not clearly proved that these parties were, on a just and reasonable view and estimate of their assets and liabilities, deeply insolvent?”

It will be observed with what extreme care and charitable caution that most learned, and able, and equitable judge frames the terms of the question. It must be clearly proved, on a just and reasonable view and estimate, that the parties were deeply insolvent. Not merely insolvent, but deeply insolvent; or, as Lord Cranworth put it, in a state of desperate or hopeless insolvency. That is, beyond all their assets, private and partnership, and on any reasonable valuation of them. Lord Justice Knight Bruce took care to add—

“They could not as rational men, and in point of fact they did not entertain hope.”

In such a case, of course, there could be but one opinion, and it must be against the insolvents. Yet the Lord Justice proceeded to express that opinion, in terms the wise charitableness of which contrast strikingly with the heated and uncharitable invectives called forth by a recent case.

“Consistently, then, with the gentler estimate of their conduct which any man would wish to take, and attributing it to fear of exposure, to the dislike which most men have to looking at what is disagreeable, these gentlemen went on. It is not necessary to characterise their conduct by any harsh terms; for who, in a state of prosperity and success, shall venture to say what would be his own conduct under similar circumstances?”

Let him who standeth take heed lest he fall. Still the interests of society at large preclude the exercise of private feeling, and require that such conduct should be marked with reprehension."*

So, in another similar case, it was thus described by Lord Justice Knight Bruce—

"The bankrupt was in a state of utter and hopeless insolvency, a condition which had existed for many years."†

And what that meant was, that his assets were unable to pay five shillings in the pound, nor, apparently, anything at all worth mentioning. In another case, there had been gross untruth and deliberate deception, in order to get hold of goods.‡ In another case, there had been wilful misrepresentations and falsifications of the books.§ So, in another case, there was conduct which was not (the Court said) to be reconciled with *bona fides*.|| In that case, indeed, the Lord Justice considered that an acceptance had been, in one transaction, acquired by fraud, and that, in another transaction, goods had been so acquired. The fraud was this, that bills were bought in change substantially as a ready-money transaction; and in a day or two afterwards, the debtor became bankrupt.¶ In that case, the Court held that the purchase must have been upon an implied representation that the payment should be in ready money, and with the knowledge that it could not be. Such a view would, no doubt, apply to receipt of money by a banker in a similar state; but it would be very different in the case of a money-dealer having assets equal to the amount of deposits, and ready assets equal to all ordinary demands. Undoubtedly, where there has been any fraudulent suppression of the truth as to the subject-matter of the transaction—as, for instance, when a debtor gives a security he knows to be worthless by reason of a prior charge—it is treated as misconduct; for such a kind of case comes within the principle of equity as to conceal-

* 21 Law Journal Reports, Bankruptcy, 36.

§ 26 Law Journal, Bankruptcy, p. 38.

† 26 Ibid., 63.

|| Ibid., 60.

‡ 26 Ibid., 57.

¶ *Ex parte Simond*, Ibid., 49.

ment.* But it has always been held, that on questions of bankrupts' certificates, cases tainted with fraud or dishonesty are to be carefully distinguished from those which are affected merely by carelessness or wildness of speculation.† And no concealment of circumstances has been held to be fraudulent, unless it has been in such a state of hopeless insolvency, that the party could not have contemplated payment, and must have contemplated bankruptcy. Gaming or gambling in the stocks and shares,‡ false representation,§ and similar misconduct, have been held to be grounds for refusing the certificate. So where a trader has sold under cost price goods purchased on credit; and this course of dealing has been carried to a considerable extent in time and amount.|| In such a case, it is manifest that the party *does not really contemplate payment at all*. So wholesale dealing in accommodation bills to an amount far beyond the party's means or expectations; for, said the Lord Chancellor—

"It was becoming a matter of too common occurrence that great frauds were perpetrated in the commercial world by means of false credit, obtained through the reckless issue of accommodation bills."¶

And the Lord Chancellor added—

"There could not be a doubt that the bankrupt contracted the debts without the ability or reasonable expectation of being able to pay them, for he knew that he had not a shilling to meet the acceptance."

Such are the cases in which a certificate has been refused or suspended in cases of wilful fraud. In one case the Court said that there might be conduct of which it was impossible to approve, but which did not amount to wilful fraud.** In substance, fraud is what is visited with condemnation, and fraud is in effect deemed to be false representation; as where a trader gets accommodation bills discounted as trade bills.†† And mere failures in judgment

* *Ex parte Holderness*, 28 Law Journal, Bankruptcy, 20.

† *Ex parte Brown*, 3 De Gex and J., 369.

‡ *Ex parte Wade*, 25 Law Journal, Bankruptcy, 6.

§ *Ex parte Leslie*, *Ibid.*, 37.

|| *Ex parte Coleman*, 3 De Gex and J., 43.

¶ *Ex parte Barker*, 38 Law Journal, Bankruptcy, 13.

** 31 Law Journal, Bankruptcy, 6.

†† 30 *Ibid.*, 23.

or prudence have never been so visited ; as, for instance, errors as to the nature of adventures or entire securities. And although reckless trading is a valid ground for withholding a certificate, because it involves the absence of reasonable expectation of ability to pay, this objection is not deemed to apply to speculations, unless not only dangerous, but such as no reasonable man would enter into. And where the only transaction related to a colliery and a mine, the Lord Chancellor said—

“ Whatever might be thought of the prudence of such transactions, it certainly could not be said that they were not *bond fide*. And supposing them *bond fide*, and that they did not deserve the name of rash and hazardous, it would be impossible to consider the debts as having been incurred without reasonable probability of being able to pay them.”

Then the question arose as to what could be considered as rash and hazardous speculations. The case was this, that a gentleman had contracted with the owner of a mine to give him a sum of money for it, the contract being dependent on the formation of a company. The Lord Chancellor said—

“ This was such a transaction as is frequently entered into ; and flourishing concerns, beneficial to all parties, often originate in this way. It cannot be said that a transaction of that kind, apparently *bond fide*, in this sense that the scheme was practicable and capable of being fairly and honestly brought into operation, is to be branded with the name of a rash and hazardous speculation. To bring it within the condemnation, it must appear to have been such a speculation as no reasonable man would have entered into.” *

Finally, in consideration of these questions, assets are deemed to be of the value which they would realise on a fair and favourable sale, not a forced and unfavourable sale. Thus where the value had not been realised only from a desire not to force the sale, the Court held that if the assets were fairly worth the required amount, that was sufficient, even although it had not actually been realised.† Failure of estimates also had never been held a ground for imputing fraud, supposing those estimates reasonable ; and

* 32 Law Journal, Bankruptcy, 50.

† 23 Ibid., 71.

least of all, failure of estimates on a forced sale under unfavourable circumstances.

Such has been the standard of commercial morality upheld by the best and ablest of our judges in equity and bankruptcy, and it will be for the reader to determine whether, upon this standard, there was any failure in commercial morality in the conduct of the defendants in the present case. The question is one of considerable interest, and it is one which no person is competent to determine who has not given his mind to the consideration of the best standards of commercial morality as afforded in the judgments of the best and ablest of our judges, not only in equity, but in the Court of Bankruptcy, which is peculiarly a court of commercial morality.

Enough, however, has been stated as to the law on the subject, and it only remains to show its application to the particular case in question by giving a succinct history of it, and the circumstances out of which it arose.

The case arose out of a scheme for the formation of a company to promote and carry on the business of a great firm of bill-brokers and money-dealers, incomparably the greatest monetary house in London, and no doubt in the world. The business had been carried on for more than half a century, and as it was of unparalleled magnitude, its history was of no small interest.

"The great firm of Overend, Gurney, and Co. is stated on all sides to have been founded towards the end of the last century, and it had consequently been in existence, in 1865, for at least sixty-five years. During that period it had attained the highest commercial repute, and was universally considered by those best informed on such subjects to be one of the most flourishing and money-making concerns in the greatest commercial city in the world." *

It is probable that the business of the house as money-dealers and *quasi* bankers had arisen, by a natural process of development, out of the business of bill-brokers, which was its basis, and that that business had enormously developed after the important legal decision in 1835, already

* Vice-Chancellor Malins, *Peck v. Turquand*, in Chancery.

noticed: that bill-brokers might, by usage, pledge the bills of their customers in a mass, even though not discounted with them, but only entrusted to procure them to be discounted. The effect of this decision must have been greatly to augment the business of bill-brokers, and develop it into that of money-dealers, for it established their right to deal with all the bills of their customers, as well those they had not discounted as those which they had discounted; and it thus enabled them to deal with the whole mass of their customers' bills, and raise money upon them, as well as with the whole mass of their customers' money on deposit. And so when money had been raised or advanced by them for customers upon bills, the money could often be left with them on account; and on the other hand, it was known that they could always in their business of discounting receive money on deposit at interest. They gradually and successively became money-dealers and bankers, but chiefly money-dealers; that is, *dealing with the money and bills of their customers*. The basis of the business was bill-discounting, and they took money on deposit at low rates of interest, to enable them to discount at higher; or they obtained money by re-discounting bills of their customers, or pledging bills of their debtors, to enable them to borrow or raise money with which thus to discount. And as the vast commercial business of London was mainly carried on by means of bills, almost all of which were discounted, there was hardly any limit to their power of using money in their business.

The nature of the business of the firm, and the accounts kept, may be thus described:—They received money on deposit, and dealt with it as money-dealers. But as they received money on deposit at low rates of interest, and made what profit they could of it by using it for discount or advances at higher rates,* these deposits of money were

* The amount of these deposits was, at the time of the transfer, not less than several millions, all which enormous amount was in their hands to be dealt with. The accounts

received either from private customers* or country bankers; and were entrusted to them for the very purpose of receiving interest upon them, and of their being thus dealt with,—they, in fact, buying the use of the money, and selling it again at a profit.

Thus, with the money thus deposited with them at interest, and with their own, the firm dealt, by discounting bills, and making advances on such securities at higher rates than they paid, the difference being their profit in money-dealing. In short, they received money at low rates, and lent it at higher rates, and the difference was profit; and the amount of their advances was about ten millions a year. When they discounted bills in order to augment their available capital, they re-discounted them—if they could—at lower rates than they were to renew, so as to save more money for the purpose of dealing with, and discounting or advancing again at higher rates; so that in their business money was perpetually being turned over at short periods, and used again and again.

The result was, that the amount of money turned over in the business was calculated, not by millions, but hundreds of millions. For ten years, as was proved on oath during the late trial, the average annual amount of money annually turned over in the house was £15,000,000; the average amount of bills annually discounted was £5,600,000; and the average annual profit upon this vast amount of business was not less than £180,000. This appeared from a statement drawn up by their official liquidator, who stated that for the year 1859–60 the amount of “turn-over” was £156,000,000; and he then read the following

of the deposits were kept in deposit ledgers. There were more than five millions of private deposits alone, and as they were at interest, they were likely to remain.

*It appeared at the examination that there were 500 of these private accounts. The amount held on private drawing deposit accounts was £5,147,444. The books of Overend, Gurney, and Co. showed at what dates the deposits were capable of being withdrawn. They were entered in “the single deposit ledger” of the firm, and the first entry is the 3d of August, “2½ 7d. n. £902,” which meant that the money could be drawn out at seven days’ notice.

statement of the amount annually turned over, in round numbers :—

1859-1860	...	£156,000,000	1863	...	£177,000,000
1860	...	170,000,000	1864	...	198,000,000
1861	...	138,000,000	1865 (to July 31)	...	117,300,000
1862	...	157,000,000			

The witness stated that he did not believe that £180,000 or £190,000 a year would be at all an exaggerated estimate of the average annual amount of net profit. He also compiled a statement of the amount of bills discounted during the same period :—

1859	...	£62,000,000	1863	...	£66,370,000
1860	...	62,000,000	1864	...	74,984,000
1861	...	53,645,000	1865 (to July 31)	...	41,388,000
1862	...	64,314,000			

And he had made a statement from the books of the business and profits of the old firm for a period of ten years, and he now produced that statement, which was as follows :—

	Amount of Profits.	Amount divided.	Amount carried to Reserve.
1851	£136,769	£120,000	£37,415
1852	186,886	180,000	60,000
1853	212,977	—	—
1854	153,500	80,000	73,500
1855	155,256	132,000	23,256
1856	148,617	140,000	8,617
1857	144,460	—	144,460
1858	293,628	240,000	53,628
1859	442,074	360,000	82,074
1860	343,373	216,000	127,373
Total	£2,236,982	£1,468,000	£556,711

The witness stated that the average annual amount of profit was £240,000, and the average amount of profit divided was £146,000.

It appeared that the bulk of the capital employed in the business was composed of the deposits, which, in such a

business, he stated, are regarded as working capital ; and for three years the total amount of business done was this—

	Turned over.	Bills discounted.	Deposits.	Profits divided.	Reserve.
1858	£150,000,000	£82,450,000	£13,000,000	£240,000	£53,600
1859	156,000,000	63,000,000	14,000,000	360,000	82,000
1860	171,000,000	62,800,000	11,800,000	216,000	127,000

Thus it appeared that (as the official liquidator stated) the credit of the business could support deposits to the amount of £12,000,000 to £14,000,000, all of which, he said, were to be regarded as available capital, all turned over in the discounting and bill-broking, and might be turned over ten times in a year, the profit being the difference of interest gained. The business, in fact (as the Lord Chief-Justice put it), was carried on for the most part with other people's money, as the firm were money-dealers, not mere bankers, who keep money for customers, on drawing accounts, and so must have it always ready on demand.*

For some years, however, the old members of the firm having withdrawn from an active concern in the management, the house had embarked in a new line of business, entirely foreign from their proper business as bill-brokers and money-dealers, and had made advances to an enormous amount on the security of property ; not capable of ready realisation, and subject to rapid and disastrous depreciation. Thus many hundreds of thousands had been advanced to steamship companies on the security of the shares,† or to railway contractors on the security of shares, or to merchants on the security of goods, transferred by commercial documents liable to be defeated, or taken at a value capable of being depreciated. These advances having gone on for some years, had amounted to £4,000,000, out of which not more than a million was estimated to be good, and that not immediately available ; so that the whole amount was

* Watts v. Christie, 11 Beavan's Reports, 546.

† Nearly £900,000 to the Atlantic Steamship Company, £400,000 to an East India Steamship Company, £600,000 to a Millwall Iron Company, £300,000 to another, £250,000 to a railway contractor on the security of railway shares, £230,000 to a firm of merchants on the security of goods transferred by bills of lading, duplicates of which the debtors retained, on getting hold of the goods, and defrauding their creditors.

locked-up capital, and £3,000,000 were bad assets. In other words, the house had lost that amount. On the other hand, though they had ceased for some years to divide the profits, carrying them to a reserve fund, their proper business as bill-brokers and money-dealers had continued to be, and was, as will be seen from the above statement, as profitable as ever. The business remained the same, producing profit to the amount of £180,000 or £200,000 a year, but the partners had lost £3,000,000.

The extent to which this would affect their business would depend of course partly on its nature and its position, and partly on the nature of their estates or other assets. As to the nature of their business, it has been seen that as money-dealers and bill-brokers they *owed* money they had borrowed, and they were liable to repay money they had received on deposit; and, on the other hand, they had bills or other convertible securities for advances, most of which they had pledged, but some of which they retained, and they had some actual cash. As to the money they owed for money advanced, it was nearly balanced by securities they had deposited; and the main question was as to the money they had held on deposit at interest. This was, in one point of view, used as capital in the business, and though liable to withdrawal, yet, in the ordinary course of things, it would not be withdrawn, or would be replaced by other deposits; so, though strictly a liability, it was not a present or even probable liability. Speaking roughly and in round numbers (which are all that are necessary to illustrate the law), they owed about £8,000,000 for money borrowed, for which securities for the most part were held, and they had about £7,000,000 of deposits of customers, about £2,000,000, secured, from country bankers, and £5,000,000 from private customers, unsecured; this being, it is evident, the main item in the accounts. As to assets, they had, as already stated, deposited securities for nearly all their debts for money borrowed, and for £2,000,000 of their liabilities for money

they had received or deposited at interest ; so that the question came mainly to the £5,000,000 of private deposits. To meet these, they had about £2,000,000 of convertible securities, and not above £1,000,000 in value of doubtful and not readily convertible securities. In addition to this they had an amount of actual cash just sufficient for current demands ; so that there was a deficiency of ready assets of about £3,000,000, and a total deficiency in the trade assets of the house of £2,000,000. To balance this, however, they had private property to the estimated value of about £2,000,000 ; so that, according to their estimate, they were solvent : that is, even excluding the bad debt, they had an amount of assets equal to their liabilities, though £3,000,000 of these were not readily convertible, and required time to realise ; and there does not appear to have been any actual deficiency of ready assets to meet actual demands, the debts being secured, and the deposits not likely to be withdrawn to an extent exceeding those received.

According to the principles of the cases which have been cited, therefore, they were not in such a position as that, even in an equitable point of view, their continuance of the business could have been deemed to be improper in the sense of being fraudulent, however it might be in point of prudence. They had £7,000,000 of money of customers to deal with, and £2,000,000 of money of their own to meet any margin of excess of withdrawals over deposits, besides £120,000 actual cash in hand ; and they had a business producing from £180,000 to £200,000 a year clear profit. Under these circumstances, therefore, there was nothing to prevent them continuing to carry on the business,* except considerations of prudence. They had given up the bad business, and their regular business was enormous. Their balance-sheet, indeed, showed an amount on each side of about £15,000,000, and was balanced only by including the £4,000,000 of doubtful assets. But then, if £1,000,000 were computed to be good,

* As Mr Harding, the official liquidator, so stated at the trial.

and of the rest £2,000,000 was made up by estimated value of estates, another £1,000,000 by the amount of the partners' balances in the books, which, as it made up the £15,000,000 on one side, of course could be struck out on the other. And then of the £14,000,000 remaining on the debit side, not less than £5,000,000 were not debts in the ordinary sense of the term, but deposits, and deposits at interest,—not likely, at least in ordinary times, to be withdrawn to any great extent beyond the amount of new deposits. And to meet an excess of withdrawals over deposits, they had a considerable sum available. There was nothing, therefore, to prevent them going on, except considerations of prudence and propriety with reference to the safety of the depositors, and with reference to these considerations it was deemed improper to do so. It was therefore proposed to form a company, to purchase and carry on the business, on the basis of raising a capital of £5,000,000, equal to the amount of the deposits, so as to ensure absolute safety to the depositors; but, at the same time, not to call out more than £1,250,000, as this, it was considered, would be amply sufficient to carry on the business, and secure safety, until the assets were realised. This amount of £1,250,000, it was estimated, would be fully secured by the private property of the partners and, at the same time, would enable them to take time to realise those estates to the best advantage, and also to realise to the utmost all that could be made of the doubtful assets. They proposed to transfer the good assets to the company, but not the doubtful assets, the burden of which they were to bear themselves, so far as required to meet any deficiency; but they were to be allowed time to do this, as the property taken by way of security—ships and shares—was of such a kind as could not be realised to advantage without waiting for a favourable season. Finally, they were to guarantee any deficiency in the assets transferred, and while they were to be entitled to credit for £500,000 for the good-will, half was to

be in shares of the company, and the other half to be paid in cash, but to be held over, and the whole amount to be hypothecated to the company as security. So that they were to receive nothing for their transfer of the business unless the business transfer turned out safe, and the business successful, and they in effect guaranteed the success. These terms were proposed to four independent gentlemen of high commercial position and of considerable wealth, and were accepted by them,—the old firm having disclosed everything to them as to their position.

"On the formation of the new company, it was thought necessary that a new directory should be introduced, in order to represent the shareholders who might bring in the new capital, and who, by their high character and well-known commercial standing in the City of London, might give confidence to the shareholders. It is only justice to the old firm to add, that to those four gentlemen, *who must be considered the representatives of the shareholders in the proposed new company, the fullest disclosure of the state of the concern was made.* No one fact appears to have been concealed from them."—(*Vice-Chancellor Malins.*)

Discussions took place between the members of the firm and the proposed new directors as to the position of the business, and a communication was made to them in writing by the head of the firm,* drawing a distinction between

* "*Confidential.*—We have already communicated to you in confidence, that we estimate the gross earnings of our business for the ten years ending the 31st December last, to have averaged about £227,000 per annum. This is after deducting interest on capital and all expenses except income-tax, but without deduction for bad debts, or for interest accruing from our having recently held several locked-up investments which have produced no return. We beg to state that during the first six years of the above time the actual divisions of profit among the partners in the firm, after paying interest on capital and writing off ascertained losses, averaged £185,383 per annum. In the four succeeding years we made no divisions of profit, having reserved the entire earnings of the business in those years against losses which ensued from various transactions by way of investment, loan, or discount, which were entirely extraneous to the legitimate concern of our business, but upon which we unadvisedly entered. These transactions were connected with various advances made to companies and firms engaged in the shipping, shipbuilding, and timber trades. They also comprised loans to railway contractors, as well as advances to a West India firm, against bills drawn in connexion with their colonial estates. Excluding for the present calculation the losses sustained from exceptional transactions of this character, and from business apart from the legitimate discount business of our firm, we consider that our losses during the above four years, upon bills discounted in the regular course of our legitimate business, have been as under—namely, from failures in 1861, £15,000; ditto in 1862, £9198; ditto in 1863, £2687; ditto in 1864, £102,583. You will observe that this gives an average on the four years, calculated as above, of £32,532 per annum, but that the average includes one year (1864) of unusual pressure."—(*In Evidence at the Mansion House.*)

the extraneous and irregular business which they had abandoned, and the regular and legitimate business they proposed to transfer, stating that on account of losses on the former, they had divided no profits for some years, but that the profits on the regular and proper business remained.

The terms of the arrangement were the subject of correspondence at the time between the members of the old firm and those connected with them,* and from that correspondence it appeared that they had entered into estimates, whence it appeared that there would be a surplus or excess after the realisation of the assets, and that they had expectations of a more favourable period for realising them.

Such having been the arrangement which was discussed and agreed to at several meetings of the proposed new firm and the new directors (in the presence of the solicitor of the former), and it was embodied by one of the latter, Mr Gordon, in the following draft prospectus, submitted to Mr Gurney, the head of the firm—

* Thus, in May, the transfer being in June, Mr D. Gurney, interested in the Norwich Bank, wrote to Mr J. H. Gurney, one of the firm :—

"You appear to have done quite the right thing in negativing the proposal of continuing O., G., & Co.'s business, and I trust there will be no side-wind attempt to frustrate negotiations with the National Discount Company, and I think, if the result is successful, we shall all rejoice. I regret very much that you think you have overrated the excess, and I trust that when you go accurately into figures it will not turn out to be the case. I should hope the termination of the American war might lead to greater ease in selling the ships." Indorsed—"May 25, 1865. D. G. as to estimate of surplus."

At this time it would seem that there had been some negotiations with the National Discount Company, but next month it had been relinquished, and the plan of the new company was ventured on, for the same wrote to the same—

"I am sincerely pleased that everything is in good train for the formation of the new company, and I trust all will go well in starting it, and that you may find a fourth desirable director. Your account of Mr Gibb is very satisfactory. But I certainly feel a very great objection to our joint and several guarantee for the deficiency of the new company, both because it places our marriage settlement bonds on a *pari passu* level with the fresh bond, and also abstracts our private assets from our Norfolk creditors, or rather places them after the requirements of the liquidation fund. . . . I think it likely the elections will oblige us to put off the settlements until the beginning of August, but we shall see as to that soon. Is there a condition that we must not sell our shares of the new company under a certain time? I am kindly sensible of your great kindness as to what you say respecting your being willing to make a sacrifice in my favour when it comes to the appropriation of losses."—(*Letters in Evidence.*)

"An offer having been made to and accepted by — for the purchase and transfer of their business to a joint-stock company (limited), the proposed arrangement has been completed on terms which cannot fail to yield a satisfactory return to the shareholders.

"Three of the present partners of — have agreed to become directors of the new company, thus securing, in addition to their valuable administrative services, the continuance of the peculiar and most important family connexion which the firm have so long enjoyed.

"The company have been fortunate enough to secure the services of the well-trained and experienced staff of —, as well as the possession of the commodious and admirably-situate premises in —.

"The interest of — will cease on the 30th of June, and that of the company will commence from and after the 1st of July.

"All the existing liabilities of — which may be taken over by the company will be [most amply and satisfactorily] guaranteed [by the vendors].

"Thus the company will have the advantage of at once entering on a large and profitable business.

["There will be no promotion-money paid, directly or indirectly, while the preliminary expenses will be limited to the ordinary professional charges.]

"The directors, in introducing this most important company to the public, deem it unnecessary to point out its great advantages as an investment. Of this no surer evidence could be adduced than the name and character of the existing business, its extent, and its returns; while the new Board venture to express a belief that, owing to the daily increasing commercial business of this country, their own augmented resources, their extended connexion, and their large administrative power, they will be enabled to maintain, if not considerably to increase, the profits so long earned by —.

"Something might be introduced as to the pecuniary interest taken in the new company by the partners of —.

"Allusion also might be made to the fact of the immediate enjoyment of a large and profitable business."

Upon full consideration, the terms of the proposed prospectus were carefully settled in strict accordance with the truth, and various alterations were made with a view to avoid any exaggeration or over-statement of the case. Thus the rough draft begun, "An offer having been made to and accepted by (blank) for the purchase and transfer of their business to a joint-stock company (limited), the proposed arrangement has been completed on terms which cannot fail to yield a satisfactory return to the shareholders." The directors did not say so much in the prospectus which they did issue,

apparently anxious to avoid anything like a false prospectus. In the margin was written,—“The company will thus have the advantage of at once entering on a large and profitable business.” In the published prospectus, they did not say that the business would be highly remunerative; but that the *purchase* could not fail in *their opinion* to secure a highly remunerative return to the shareholders. “The interest of (blank) will cease on June 30, and that of the company will commence from and after the 1st of July.” “All the existing liabilities which may be taken over by the company will be most amply and satisfactorily guaranteed.” “Most amply and satisfactorily guaranteed” was struck out, and in red ink was substituted “under the guarantee of the vendors.” In the rough draft it was said there would be no promotion money; in the prospectus it was said the good-will would be bought for £500,000. The draft went on to say that the shareholders would have a good prospect of increasing the profits which Overend and Gurney had long earned. Nothing was better calculated to give the public confidence than that, but it was struck out. From the draft it appeared that the original intention had been that the vendors should subscribe one-third; but in the prospectus which was issued nothing was subscribed, and they took instead £250,000 in shares.

In order, however, to carry out the arrangement, it would be necessary to have articles of association and proper deed of transfer and covenant. Instructions were given to the attorney to cause them to be prepared, and he instructed a conveyancer for the purpose, who deemed that as these were two distinct transactions—the one a transfer of the business and good assets, the other an arrangement as to the doubtful assets which were to be excepted, and *not* transferred, but to be kept and wound up by the firm—two deeds were necessary. The new directors had separate counsel, who concurred in this view; they settled the deed of transfer, but could not agree for some time

longer in settling the other. The deed of transfer was settled between them to this effect.

It recited that arrangements had been made for the transfer of the business, and that the vendors agreed to sell, and the purchasers to take it as a "going concern"—that is, the *business of bill-brokers and money-dealers*—for £500,000, to be paid or brought into account, half to be taken in shares, and the rest to be *treated* as paid, or taken into account, between the parties; so that *nothing* was to be paid down, but to be made a material guarantee for the performance of the contract. And then it was provided that, *except* such accounts as the directors should *require to be reserved or excepted* (plainly pointing to some *future* arrangement as to excepted assets), the accounts of customers or debtors should be transferred to the company. And then it was further provided that the company, "Save, as is hereinafter provided, with respect to the bills, securities, mortgages and property held by the vendors on any accounts which shall be reserved or excepted to be wound up by the firm, should be entitled to all assets," &c.

Then the vendors guaranteed the company that the *assets, of which the company should take the benefit*, should equal the amount they should have to pay; and the vendors further guaranteed payment in full of *all assets taken by the company*. And it was, moreover, provided that the vendors should continue to act to wind up such accounts as the directors should require to be wound up by them, and no bills, securities, or property held by the vendors on such accounts should be transferred to the company, but should be deemed reserved and excepted.

It afterwards appeared* that the members of the firm had entered into estimates as to the value of these estates, which, had that value been realised, would have not only fully met the deficiency in their assets, but would have left a considerable surplus; this of course supposed that the estates were disposed of at such times and in such

* It appeared from a paper, in the handwriting of Mr J. H. Gurney, on which the official liquidator drew out this :—

manner as to realise to the utmost their real and full value. In the correspondence between the partners, moreover, it appeared * that those who were interested in the firm were sensible of the stringency of the liability imposed by the guarantee, and were aware that it might in the event of a considerable failure in the doubtful assets to be realised absorb the whole of their private estates to meet the deficiency. Nevertheless, it appeared either that the members of the firm felt it to be only just, or that the new

ESTIMATE OF THE ASSETS OF THE OLD FIRM, JULY, 1866.

Balances of Gurneys', Norwich, ...	£787,000	
Less sums transferred, ...	197,719	
		590,281
Land, ...		556,000
Sundries, ...		613,000
Reversions and life interests, ...		180,000
		<u>1,948,281</u>
Estimated value of good-will of Norwich Bank, ...	300,000	2,248,281
Suspense and guarantee account, ...	4,213,896	
Reduced by partners' balances, ...	1,053,715	
		<u>3,160,181</u>
Further reduced by estimated value of excepted accounts, ...	1,062,000	2,078,181
Apparent surplus, ...		170,000
Good-will of Gurneys', ...		500,000
Estimated surplus, ...		<u>£670,000</u>

This, of course, did not prove itself the truth of the estimate, but it went far to prove all that could be material with reference to the criminal law—viz., its honesty. And the official liquidator declared on oath that he considered it to have been a fair estimate.

* "I have looked over my marriage settlement, which is very much as I supposed. The amount of £20,000 was to be invested in mortgage on Government stocks, and £12,000 was on mortgage, and £8,000 remained in my hands, a bond being given for it; both of these are now paid off, and the money entirely in my hands. It is a very awkward case, and I cannot think I ought to place the amount on the same level of security as my bond to O. G., & Co. In short, I feel very uneasy about this and the marriage settlements of my daughters and sons, especially the former. I acceded to your kind proposal of giving security, but you must bear in mind that in the case of a real catastrophe, all my family and myself would be in total destitution, or almost so, and I do not see how these settlements would be protected. I hope Charles will come to-morrow; but I cannot help thinking the independent directors of the new company would allow our present private debts to precede the bonds about to be given."

Indorsed—"June, 1866, D. G. to J. H. G., as to D. G.'s family settlements, and J. H. G.'s guarantee for a portion thereof under certain contingencies."

It was afterwards supposed that the phrase "real catastrophe" in the above, meant a catastrophe to the company, but it is clear it meant a catastrophe to the firm, through having to make good a deficiency.—(*Letters in Evidence.*)

directors insisted upon it, and thus, therefore, the terms above stated were, after much discussion, ultimately agreed upon.

Thus, therefore, the whole frame of this deed pointed, (as the Lord Chief-Justice observed on the trial) to some other and further deed to carry out the arrangement as to the excepted accounts which were not to be transferred; the first deed—the deed of transfer—being confined to such as were to be transferred. And the second deed afterwards settled, related entirely to those excepted accounts thus pointed to in the first. Not being settled at the time the first was settled, which contained the terms of the transfer, the prospectus was issued upon that, and the memorandum and articles of association to which the members of the firm and the other promoters were subscribers, and which stated that the company might purchase the business and good-will of Gurneys; the consideration to be money or shares, as might be agreed upon. On the 12th June 1865—the day the deed of transfer was settled, but before it was executed, as it was intended to be executed with the other, and neither could be executed until the company had been formed—the memorandum and articles of association were filed, and the prospectus, next day, was issued to the public in the following terms:—

“OVEREND, GURNEY, AND COMPANY (LIMITED).

“(Incorporated under the Companies Act, 1862.)

“Capital £5,000,000, in 100,000 shares of £50 each, of which it is not intended to call up more than £15 per share.

“Deposit on application £2 per share; £5 per share on allotment, £4 per share on the 15th of September, and the same on the 15th of November.

“Directors.—Henry Edmund Gurney, Esq., 65 Lombard Street; John Henry Gurney, Esq., 9 St James's Square, and Catton Hall, Norwich; Robert Birkbeck, Esq., 65 Lombard Street; Henry Ford Barclay, Esq., Monkham, Woodford, Essex; Thomas A. Gibb, Esq. (Messrs. T. A. Gibb & Co.), 72 Old Broad Street; Harry G. Gordon, Esq., Chairman of the Oriental Bank Corporation; William Rennie, Esq. (Messrs. Cavan, Lubbock, & Co.), 16 Leadenhall Street.

“Bankers.—The Bank of England; Messrs Barclay, Bevan, Tritton, Twells, & Co., 54 Lombard Street.

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs Overend, Gurney, & Co., of their long-established business as bill-brokers and money-lenders, and of the premises in which the business is conducted; the consideration for the good-will being £500,000, one-half being paid in cash, and the remainder in shares of the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders.

"The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

"Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr Henry Edmund Gurney and Mr Robert Birkbeck) will also occupy the position of managing directors, and undertake the general conduct of the business.

"The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment.

"The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company, and the permanent interests of the shareholders.

"Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company."

As already stated, the other deed as to the excepted accounts was not then settled, nor was it so until after the allotment.

It will be observed that the prospectus disclosed upon the face of it *that there would be a deficiency in the assets*; for it stated that the vendor would *guarantee* such deficiency. It will also be observed that there was no statement as to the nature or value of the assets, or the amount of the profits of the business.

Immediately after the publication of the prospectus—although it alluded to a guarantee of losses or deficiencies, as assets or liabilities—such was the influence of the name of Gurneys, that applications were received for not less than 224,480 shares; that is, nearly 125,000 in excess of the entire number to be allotted altogether.

Hardly any of the proposed shareholders went to see the deed, which was open to inspection; and of those few who did, none of them made any inquiries as to the excepted accounts, or as to the supposed deficiency.

On the 24th July—twelve days after the publication of the prospectus—the allotment of shares commenced, and on the 28th it was completed. The total number of shares then allotted was 83,180, some thousands being taken by the new promoters, the remainder being taken by the members of the firm. Altogether, the directors had shares to the amount of nearly a million in the concern.

In the meantime, not until the 27th July, the day before the completion of the allotment, the second deed was settled by counsel. It related entirely to the “excepted” accounts, which were not, except one of them, named or mentioned, but only described, as “including all accounts with the firm of persons, or partnerships, or firms, whose affairs are in course of being wound up; and all accounts open in respect of unrealised property or securities taken by the firm.” For these there was to be a “suspense period” of three years and a half, during which the firm were to wind them up, and a separate account, called “the Suspense and Guarantee Account,” in which, to the credit of the firm, were to be carried all amounts realised; and then, at the end of the period, they were to be debited with the residue—an amount equivalent to the total amount, being deemed a debt due from the firm to the company to be so liquidated. No amount was mentioned, and there was nothing in this deed any more than in the other to disclose any amount. On the 8th August, several days after the company had started, the two deeds, which were designed to be and described as contemporaneous, were executed; and the company then was in full operation. It continued in operation for nine months, from August 1863 to May 1864; and during that period, did an enormous amount of business. For some months to the close of the year of transfer, there being no unusual withdrawal of deposits,

1865

the business went on prosperously (except, indeed, that by bad management, upwards of a million of new bad debts were being made), but there was no pressure or distress arising from deficiencies of assets, and the million and a quarter raised from the shareholders was sufficient.

It is now necessary to trace the history of the company. There was no diminution in the amount of business done; they discounted bills to the amount of £56,000,000, which was at the rate of £70,000,000 a year, a larger amount than had ever been realised by the old firm.* The profit on these £56,000,000 of bills would be £133,000, which was at the rate of about £180,000 a year. Nevertheless, through unforeseen causes, this profit was reduced to a nominal amount, and large disastrous losses ensued, which ultimately destroyed the company. The causes were the great and continued rise on the rate of interest, and a rapid withdrawal of deposits, caused by panic. The rate of interest during the period of the company's existence, especially the last four months, rose from $3\frac{1}{2}$ per cent. to 8 per cent. The result of this was, that the company could only rediscount bills at a higher rate than they received, and this being continued for several months, reduced or rather absorbed their profits.

In the meantime, in order to supply the deficiency of ready money required by the exigencies of the business, the members of the old firm commenced to sell their estates, in accordance with their guarantee. This became known, and caused a run upon the house, insomuch that in four months as many millions were withdrawn, and the company were five millions the worse as compared with

* "From the 1st August 1865, when the limited company started, to the 31st December 1865, the total amount of bills discounted by them was £29,129,000, and in the nine months of its existence the amount was £56,029,000. The bills were not all rediscounted, but those that were so during that time amounted to £31,599,000. That was a very large discount business, and should have brought out a very large profit. And it produced a profit of £133,000. But, unhappily, during the period this company were carrying on business, there arose a great pressure on the money market, and a great crisis took place. The Bank of England rate rose considerably. There were failures, everything was very much depressed, and the consequence was, that many of the bills were dishonoured. The effect of the bank rate rising was to diminish their profits very considerably, and to produce a great loss on the rediscounting of bills."—(*Evidence of Harding.*)

the beginning of the year. The rate of interest was now 8 per cent; the withdrawal of such an enormous amount of money rendered it impossible to go on without more money, and it was equally impossible to obtain it. Hence, on the 10th May 1866, the company closed doors. At that time the position of affairs was this, that the amount of the suspense and guarantee account was reduced—i.e., of the doubtful and deficient assets—to £2,900,000, but the withdrawal of deposits had amounted to £5,000,000; and it results, from the plain evidence of figures, that the stoppage was due to the latter cause rather than the former.

The day after the stoppage of the company, two eminent accountants, Messrs Harding and Turquand, were appointed by Vice-Chancellor Wood as official liquidators, and under their able auspices the best possible measures were taken for the liquidation of its liabilities. Up to that date £1,250,000 had been paid by the shareholders of the company. Under the winding-up two calls of £10 each were made. These calls produced together £1,652,441, which went into the general funds and were distributed among the creditors. The total liabilities of the company were still £950,000, and another call of £5 per share was resolved on. But although this fresh call of £5 was required, there were outstanding assets which were estimated to realise rather more than the present indebtedness of the limited company. The amount of the general assets of the limited company that remained unrealised on the 31st December 1868 was estimated to produce £1,150,000, but they were not immediately available, leaving a balance of £950,000 due to the creditors. The result would be that the shareholders would have paid to the creditors about £2,900,000, which was about the amount remaining due to the company from the old firm.

Thus the general result was, that the shareholders were called upon to make good above three millions of money to the depositors, and had to pay five millions instead of one and a quarter, which was all that they had expected

to pay, and this was a result of course calculated to cause discontent and dissatisfaction. The shareholders combined together for mutual protection, and formed an association with that object. Large bodies of men, irritated by losses, are easily excited, and were soon brought to think that they had been defrauded. It was discovered that there had been more than three millions of assets doubtful or bad, and they forgot that these assets had not been transferred, and that the ruin of the company had been caused, not by the want of three millions, but the withdrawal of five. It was discovered that there had been a deed which had not been before heard of to arrange about these excepted assets, and they forgot that this was because those assets had been excepted and not transferred, and that the second deed merely carried out the first. Men smarting under the sense of loss were easily aroused to suspicion; and those who had never looked at the deed which was disclosed were speedily brought to fancy that they would have looked at the other, and that if they had, it would have deterred them from taking shares, although in truth it had disclosed no more than the other. Moreover, it was their interest to represent that they had been defrauded; at least they thought it was, for they had been ill-advised enough to conceive that they could defend themselves against the creditors on the ground of fraud in the directors. They were thus induced to embark in a hopeless and useless litigation on that mistaken foundation, and their whole case for relief was based upon this imputation of fraud. The better, as they thought, to assist their case, they engaged the services of an accountant, who entered into the cause with the zeal of an advocate, and whose evidence had some of the fatal defects which judges and juries have so often observed in the testimony of what are called "experts." It had the fault of one-sidedness arising from over-zeal, and so became involved in fallacies, which infected the whole case, and had an unfortunate influence on the litigation that ensued. No doubt the evidence of an

able accountant is often of great service in enabling judges and juries to unravel the intricacies of accounts, and presenting the true results, and the courts have always been sensible of the value of such assistance.* But the shareholders already had the benefit of it in the able and important services of the two experienced and eminent accountants, Messrs Turquand and Harding, who had been appointed liquidators, and whose duty and interest it was to do their best for all parties, and whose statements and deductions could be relied upon as dispassionate and unbiassed. It was far otherwise with one whose services were enlisted rather as those of an advocate than an arbitrator, and whose object naturally was to make out a case. There is nothing more likely to betray a man into fallacy; and in the case made for the shareholders there was fallacy at every step. This partly, indeed, arose from the professional infirmity, common to all accountants, of looking too much at figures, and forgetting that figures do not always represent realities in fact. This tendency limits, if it does not deteriorate, the value of such professional assistance. And to derive the advantage of it, without being misled by it, this is necessary to be kept in mind, that the most skilful accountant can only give the results of figures and entries in books of accounts, which do not necessarily represent actual realities. The shareholders' accountant saw this clearly enough with reference to the four millions of doubtful assets entered in the books as such; and he pointed out that they did not really represent assets of anything like the value in figures. And no doubt this was true; but then he failed to see that this held equally good of the five or seven millions of deposits, which, in figures, were debts or debits, and strictly were payable on demand, but which did not really represent present existing liabilities requiring provision of ready assets; yet he put them all down as if really payable, although, according to the ordinary course of business, they would

* See a recent case in the Common Pleas

remain, until replaced by others of equal amount. So, again, because, the moment a rediscounted bill became dishonoured by the acceptor, it was formally entered to the debit side of the account, he deemed it a debt, and reckoned up the aggregate of such bills to the amount of seven or eight millions—forgetting that they were only contingent liabilities, which would never really become so, since, in all human probability, all the bills would be paid by the other parties. From this fallacy followed another as to the idea of insolvency; and having put down on one side all the deposits as if instantly payable, and then the assets, including the four millions of doubtful assets, he made out a deficiency of assets, and pronounced the firm to have been insolvent—forgetting that their other assets and estates, added to what could be realised from their assets, would equal the amount of debts, and that there was nothing to show that the amount of ready assets was not equal to all ordinary demands, and would not sustain the house business until the deficient assets were realised. In fact, misled by mere figures, without looking to realities and facts, he altogether mistook the true position of the case; and, following out their fallacious premises, his conclusions, of course, were erroneous, and the whole case built upon them was resting on a sandy foundation. Upon the basis thus supplied by the fallacies of the accountant, the case was taken into Chancery, and brought before Vice-Chancellor Malins, who, unfortunately, did not detect the fallacies upon which it rested, and was so far misled by them that he fell into manifest errors, which had afterwards most mischievous effects. In the first place, at the outset, he fell into the manifest error of regarding losses incurred in advances or adventures extraneous to the proper business, as if they had been losses in that business, or as if they showed any falling off in its profits; for he said—

“There appears to be no reason for doubting that this great concern did realise enormous profits; and if that state of things had continued,

probably no change would have been attempted. But it appears that a great change in *the mode of conducting the business* took place, and a result was produced which made it necessary either to obtain an accession of capital, or to bring their business to a close."—(*Judgment of Vice-Chancellor Malins.*)

Every part of this statement was pervaded by the fallacy above pointed out. No change took place in the mode of conducting the proper business of the firm, and the state of things, in that business, continued to the last; nor was there any falling off in the profits of that business, which to the last continued as great as ever; and as the advances extraneous to that business had been discontinued, and the amount of assets of the firm and of the estates of the partners equalled the amount of liabilities, and there was nothing to show that the amount of ready assets did not equal the probable and ordinary demands of the business, there was no such state of insolvency as rendered it necessary to close the business or obtain fresh capital, however much that latter course might be required by prudence. Yet the Vice-Chancellor went on to say, misled by the specious fallacies of the accountant—

"It was disclosed (to the new directors) that the firm—the name of which had such a magic charm in commercial circles—was no longer what it had been; that it had not only ceased to make profits, but had been carried on at an enormous loss for several years, and that it was, in fact, at that time insolvent to the extent of £2,000,000, if not £3,000,000."

This was an entire error, unless insolvency is taken to mean a deficiency of ready assets to meet at once the *whole* of the debts of a firm, in which sense, probably, the Bank of England is not solvent. The Vice-Chancellor went on to support his statement by quoting isolated expressions in the examination of the partners, the true effect of which, under the influence of the fatal fallacy which pervaded his whole view of the case, he failed to perceive. They stated that "the *total* result of all the operations of the firm had been for some years a loss," and that "there had been no profits on the business *as a whole*" during that period.

But there were other passages in the evidence which had escaped the observation of the Vice-Chancellor, in which it clearly appeared that the proper and regular business of the firm had never failed to realise enormous profits. He confounded, in short, losses of the partners with losses in the business; and, even if he was right in his view that the firm was insolvent, he certainly was wrong in supposing that the partners were, or that the real business had in any degree failed or fallen short of what it had ever been. This fundamental fallacy pervaded and perverted the whole view of the case taken by the Vice-Chancellor, who thus proceeded to display its unfortunate influence upon his mind—

“In order to make the concern bear the appearance of solvency, it was necessary to take credit for a list of debts owing to it, amounting to above £4,000,000, but which were estimated as likely to produce only £1,000,000, leaving a deficiency of £3,000,000.”

Here, again, was an enormous error. First, if this were true, it only applied to the assets of the firm; and the Vice-Chancellor forgot that the partners in the firm had assets and estates to the value of a million and a half, if not two millions; and, on the other hand, it was not necessary, in order to give the concern the appearance of solvency, to take credit for the four millions of doubtful assets, but only for three, because a million of the debts was composed of debts to the partners themselves. Thus, striking off that million on the one side, and adding two millions on the other (and it *was two*, excluding the half million for good-will), the result was that there was no deficiency, and that the idea of insolvency was a mere delusion, except upon the theory that the amount of *ready* assets must always equal the *whole* amount of liabilities, which, however, is absurd. This enormous error was the more unfortunate, because it led the Vice-Chancellor to make reflections on the directors from which he would otherwise have abstained, and which no doubt did them *incalculable injury*.

"As they were about to induce others to advance them money for the purpose of carrying on this *insolvent and ruined concern*, could they, upon any principles of morality or justice, be right in concealing so appalling a fact! I am decidedly of opinion that they could not."

This opinion, it will be observed, rested upon the assumption that the concern was ruined and insolvent, which has already been shown to have been neither more nor less than an enormous error, based upon what had been called "the fallacies of an accountant." A ruined and insolvent concern, producing profits to the amount of £180,000 a year, with actual cash in the coffers to the amount of £120,000, with a working capital of £7,000,000 of money deposited at interest, for the very purpose of being dealt with, about £2,000,000 of this amount received, and the remaining £5,000,000 guaranteed by nearly £2,000,000 of ready assets or convertible securities, the rest guaranteed by £3,000,000 of assets, and estates, not, indeed, *immediately* convertible, but if fully realised, amply adequate! The utmost that could be said of such a concern was that, as its solvency depended upon *time*, it would be prudent to obtain a million of fresh capital to secure it until the distant or deficient assets were realised; and that was the course taken by the firm. But that such a concern should have been declared from the bench ruined and insolvent, does appear a most remarkable illustration of the power of specious fallacies, when supported by popular clamour, to inveigle the minds of the most able and upright judges. The fundamental fallacy lay in forgetting the nature of the business of a money-dealer, and, therefore, in reckoning the whole amount of the deposits as present or even probable liabilities. From this it would follow that the firm was insolvent if they had not *ready* assets to meet the *whole* amount, in which case the business of money dealing would be impracticable, for it would be unprofitable. In the ordinary course of such a business, as deposits are withdrawn they are replaced, and thus the money-dealer has always about the same amount stand-

ing; and to represent the whole amount as present liabilities, just like so much money borrowed, and payable, was surely a serious fallacy. That, however, was the idea impressed upon the Vice-Chancellor by the specious and fallacious statements of the *shareholders'* accountant, which, overlooking the dangerous character of the evidence of "experts," engaged rather as advocates than as mere witnesses, he unfortunately preferred to the more impartial and reliable statements of the official liquidator. Taking that fallacious view of the accounts, however, the whole of the Vice-Chancellor's view of the case followed naturally from the premises. And he easily arrived at the conclusion that there was fraud, in an equitable sense; for, if the business was unprofitable, and the firm insolvent, the non-disclosure of that state of things might have been fraudulent in an equitable sense. But it was a matter of account, and the Vice-Chancellor was misled by the mistaken opinion of an "expert."

In the Vice-Chancellor's view of the facts, his conclusion inevitably followed—

"It seems they persuaded themselves that they might rely upon the guarantees of the partners to make good the deficiency of the assets But were they not bound to tell those whom they invited to take shares of the speculations in which they were proceeding, and to give them an opportunity of judging for themselves whether they would join an insolvent and losing concern in the hope of turning insolvency into solvency, and ruinous loss into profit? I am decidedly of opinion that they were bound."

No doubt, taking the Vice-Chancellor's view of the facts, which was that of the *shareholders'* accountant opposed to that of the official liquidators, this inevitably follows; and every one will assent to his just and eloquent observations. But it is obvious that it all rests entirely upon that assumption, and falls to the ground if that view of the case be fallacious. And that it is so is apparent from this, that the Vice-Chancellor, throughout his elaborate judgment, never adverted to the peculiar nature of the business of a money-dealer, on which it is manifest the whole case would

depend. He assumed a deficiency, through adopting the accountant's view of the accounts, and then everything else followed. Of course, on such a view, the firm ought to have disclosed it to the shareholders, and *stated the amount in the face of the deed*. The observations of the Vice-Chancellor on this point showed the fallacy of the whole case of the shareholders as to the second deed having been kept back; for, according to the view of the Vice-Chancellor, its disclosure would not have helped the case at all. For in his view, as he said, the "*amount of the deficiency of the assets ought to have appeared on the face of the deed*;" and it undoubtedly did *not* so appear on the second deed any more than on the first. Thus, therefore, in the view of the Vice-Chancellor, the case of the shareholders—that the second deed was not disclosed—did not go far enough; and the deed ought to have stated the amount of the alleged deficiency. So that the view of the Vice-Chancellor came to this, that vendors of a business, giving a guarantee, are bound to disclose, without being asked, the amount of their debts, or the deficiency of their assets.

The Vice-Chancellor took no notice whatever of the statement in the prospectus that the vendors were to guarantee any deficiency in the assets transferred, nor of the clauses in the first deed, clearly pointing to ~~accepted~~ *accepted* accounts. It is impossible, therefore, to say whether he would not have deemed these documents which were disclosed to the shareholders sufficient to put them on inquiry. The reason, perhaps, why he did not advert to these matters—evidently *vital* to the question of fraud—was that the question *did not arise*. The very point he decided was that it did not arise, as it is obvious it could not, in a suit between shareholders and creditors. It could only arise in a suit between shareholders and directors. The point not arising, he did not bring his mind judicially to bear upon it, all his observations upon it being only *obita*.

In the course of his judgment, however, the Vice-Chan-

cellor said what was decisive against any legal liability of the defendants, civil or criminal, for he said—

“ I think it only an act of justice to the directors to say that *I think their conduct shows that they could not have intended to do wrong*, and what they did was the result, perhaps, of a too sanguine view of the prospects of the concern, and a too great reliance upon the guarantee of the partners; and, though the shares rose to a premium, none of them sold their shares.”

It is true that afterwards the Vice-Chancellor held, upon a bill on the part of the company against the partners in the firm, that they had been liable in an equitable sense, but in that decision he by no means implied any alteration of the opinion already expressed, that there had been no actual, intentional, or moral fraud; on the contrary, he said there was no fraud, either in a legal or equitable sense.

In that suit it was sought, on behalf of the company, to make the directors, and the executors of a deceased director, Mr Gibb, liable for the paid-up capital, and also for the amount of the calls made on the shareholders during the winding-up. The main grounds alleged by the bill were, that the former was insolvent to the amount of £2,000,000, that the directors *were aware, at the time, of the insolvency of the old firm*, and that they *did not disclose the second deed*. The four surviving directors submitted to answer the bill, but the executors of Mr Gibb had put in a demurrer, to the effect that there was no ground for equitable relief. And so it was considered by the Lord Chancellor on appeal. Vice-Chancellor Malins having overruled this demurrer, the executors appealed. The Lord Chancellor said—

“ The bill states that the directors have, by their imprudence, made a very burdensome purchase, and have fixed the company in consequence with a very heavy loss. The bill does not aver that there was fraud on the part of Mr Gibb; and, indeed, from the averments in the bill, it must be taken almost to be impossible that he should be so, because he was himself a purchaser, and had an interest in the concern; and I concur in the conclusion to which the Vice-Chancellor came when he said, ‘ There is no charge that the conduct of the directors in making the purchase was fraudulent, or that they intended to do otherwise than discharge that which they thought to be their duty to the shareholders.’ ”

This would appear to amount to a judicial decision that

the carrying out the transfer, with a knowledge of the alleged insolvency, and without disclosing the second deed, did not amount to a charge of even equitable fraud; for both those facts were stated in the bill, and must be taken to be true, as admitted by the demurrer. The bill was against all the directors, the old as well as the new; and the new as well as the old directors knew the state of the business, and concurred in the non-disclosure. Nevertheless, both the Lord Chancellor and the Vice-Chancellor concurred in holding that there was *not a charge of equitable fraud*. This, it will be observed, would only be in accordance with the effect of the cases already cited as to equitable fraud, and would appear to show that, in the observations made by the Vice-Chancellor and a noble and learned Lord in the House of Lords, as to the non-disclosure of the second deed, were not only *obita*, but could not have been intended as the expression of any judicial opinion at all, but merely as voluntary observations expressive of the opinion of those eminent persons on a matter of moral propriety. And, at all events, that the deliberate judgment of the Lord Chancellor upon appeal was adverse to these *dicta*, is manifest from what his Lordship afterwards said.

It is to be observed that, as the fact of the alleged insolvency was stated in the bill, and admitted by the demurrer (in order to raise the point of law), it was of necessity assumed by the Lord Chancellor; although, on the other hand, it is to be borne in mind that it was only rated as an insolvency to the amount of £2,000,000, which would be covered by the estimated value of the private assets; and so, in point of fact, there was, as already shown, no insolvency at all. The Lord Chancellor, however, was obliged to assume it; and he said—

“The bill states that the firm was insolvent to the extent of at least £2,000,000. That, probably, is the strongest averment in the bill; but, at the same time, it must be taken to mean exactly what it says—namely, that *if the firm had stopped*, they would not have had assets sufficient to meet their liabilities by the amount of £2,000,000. Still, I must not

assume more than is averred; and I apprehend it to be the case in all large concerns of this kind, that there are a number of debts *which are not available on a given day*, but which, nevertheless, may be of *considerable value* if time is allowed—time being, in mercantile affairs, most important with regard to matters of this nature.”

It must be manifest, from these remarks, that the Lord Chancellor, (who, doubtless, remembered the cases already cited on the subject, in some of which he had been counsel,) meant to convey just what has been already demonstrated, that there may be a kind of *contingent* insolvency, or an insolvency only arising in the event of *all* the debts of a firm becoming payable at once, which is not really insolvency (though it might support a bare legal averment of the fact), inasmuch as it may only arise from assets being locked up, not from there being a deficiency of assets in amount, so that there may be no actual insolvency, unless it should happen that the *whole* of the debts are called for at once; and, at all events, it is manifest that both the Vice-Chancellor and the Lord Chancellor must have considered that this would not be insolvency in any sense to constitute a fraud, or otherwise they could not have held that a bill alleging the fact of insolvency, and a knowledge of it at the time of the transfer, did *not* constitute a case even of equitable fraud. And as to the alleged non-disclosure of the second deed, the Lord Chancellor said—

“Great stress was laid by the Vice-Chancellor upon the second deed not being brought forward; and it was said that, if it had been produced, many persons would not have subscribed. How far an averment of that kind is to be taken as an averment of fact, I think is very doubtful; to say that any particular person would or would not have subscribed if this or that had or had not been done, is predicting the future, and *cannot be taken as an averment of fact.*”

It is to be observed that, though the bill was by *all* the shareholders, the Lord Chancellor held that the *facts stated* did not constitute a case of fraud even in equity. He said, further—

“I must consider the character of the purchase which the directors were empowered to make. They were not to buy an ordinary estate. This was a purchase of an *extremely speculative nature*. Everybody knows that all trades are speculative, and the *trade of a bill-broker cannot be con-*

sidered as the least so. The company was to embark, therefore, in that which must always be a hazardous business—a business entirely dependent on the prudence and dexterity of those who manage it.”

Thus the Lord Chancellor evidently considered the key to the true view of the case was *the nature and character of the business*. And therefore it is that it has been considered in the following pages.

In the course of the Lord Chancellor’s judgment in the case, he thus expressed his opinion as to the effect of the proposed scheme—

“The scheme would be reduced to this. We are in a state of insolvency to the extent of two millions, but we have these four millions owing to us. We must have time to get these four millions in : we will set off our one million which is due to us as partners against that collection of debts ; we will deal with the £250,000 also as entering into that account, and so far reducing the amount which we are ultimately to pay to you. During the suspense period we will try if we can get in these four millions, or we will get in as much as we can, and at the end of the time we will guarantee you the difference. . . . The company must take the consequences of having intrusted their moneys to persons of sanguine temperament who have made a purchase which turns out to be a bad one ; but I do not find enough in this case to show me that it is so ridiculous or absurd, or that there is such *crassa negligentia* as would amount to fraud.”

Thus the Lord Chancellor negatived even equitable fraud.

Defeated in equity, some of the shareholders were ill advised enough to think of *law*, although, even in equity, they had been told that there was no actual or intentional fraud—that is, no intention to deceive, which is the extent of a case of legal fraud even in a *civil* action. They must have been indeed unhappily ill advised to resort to legal proceedings when such was so well known to be the law ; and, indeed, the great majority of them were better advised, and only a very few were so ill advised as to make such a desperate attempt, and only one was so ill advised as to have recourse to criminal proceedings. In order to appreciate these proceedings, it is proper here to revert to the law on the subject, which has been already reviewed.

It has been seen that legal proceedings, civil or criminal, can only be maintained on the ground of *wilful* mis-

representation. But, as has been seen, there was no misrepresentation and no concealment as regarded the new and independent directors of the company (who formed, be it observed, a majority), nor, indeed, could there be, as the deeds were executed by them all. And therefore the only fraud, either in misrepresentation or repression, could only be imputed to the directors as regarded the intended *shareholders*. But here, again, there was no pretence for imputing misrepresentation by means of any false statement, for there was no false statement in the prospectus or the deeds. And as to mere suppression or concealment, it has never yet been held a ground even for civil proceedings at law, and is very rarely deemed to amount to fraud even in equity.

However, on the 1st January 1869, six of the directors of Overend, Gurney, & Co. — (three of whom, Messrs Gurney and Birkbeck, had been members of the old firm of Overend, Gurney, & Co., which the limited company superseded) — namely, Mr John Henry Gurney, Mr Henry Edmund Gurney, Mr Robert Birkbeck, Mr Henry Ford Barclay, Mr Harry George Gordon, and Mr William Rennie, appeared at the Justice Room of the Mansion House on summonses which charged them, in effect, with a conspiracy to defraud the shareholders of the limited company of money to the amount of £3,000,000 sterling. In the exact terms of the summonses, which had been obtained on sworn informations at the instance of Adam Thom, LL.D., the charge was —

“That they, the defendants, in July 1865, and at divers other times, in the city of London, unlawfully did conspire, combine, confederate, and agree together, by divers false and fraudulent pretences and representations, and by divers subtle devices and means, to induce the complainant and divers other persons to become, and whereby they did become, shareholders in a certain public company called ‘Overend, Gurney, & Co. (Limited),’ registered under the Companies Act, 1862, with intent thereby to cheat and defraud the complainant and other persons of divers valuable securities, bankers’ checks, orders for the payment of money, and divers sums of money, their property and moneys respectively, and which were acquired and obtained by such pretences, representations, devices, and

means, whereby the complainant and other persons were, in fact, defrauded to the amount of £3,000,000."

Now, it would be apparent to any lawyer, and, one would imagine, to any rational man of business, upon a little consideration, that it would be impossible to sustain such a charge, except by showing wilful misrepresentations as to the value of the business. And as no representations had been made to the shareholders except in the prospectus, it would be manifest that the case must turn on the truth of the statements in the prospectus, which were simply these: That it was not intended to call up more than £1,125,000; that the terms could not, *in the opinion of the directors*, fail to ensure a highly remunerative return; that the vendors guaranteed the company against any loss on the assets and liabilities transferred; that they retained a large pecuniary interest in the concern; and that the deed of covenant *relating to the transfer of the business* was open to inspection. The only question, in any legal proceeding, civil or criminal, could be, whether any of these statements were wilfully untrue and intended to deceive. And upon this view of the law, the case might at once have been dismissed upon the mere statement of it. For there was no evidence to prove that any one of these statements were untrue; and they were indeed proved to be true by the evidence for the prosecution itself. The best proof that it had not been intended to call up more capital was, that no more was in fact called up during the period of the company's existence, and that it broke down from causes utterly unforeseen. The opinion of the directors was supported by the fact proved by the official liquidator that the business had not fallen off, and that profits had only been destroyed by the portentous rise in the rate of interest. Their interest in the concern was simply this, that they were not to realise a shilling unless it succeeded, and that they had about a million invested in it. And there was no question that they had given no guarantee against losses or assets transferred, and the deed relating to the

transfer was open for inspection. Thus, therefore, the prospectus was not only not proved to be untrue in any respect, but was proved to be true in every respect. And to any lawyer it would be obvious that the case entirely failed on the mere statement of it. It was indeed attempted to sustain it on the ground that the guarantee given was worthless, because of the alleged insolvency of the vendors. This would be a novel and unaccountable head of fraud, even assuming the insolvency (the notion of which, however, was based on a fallacy already pointed out); for any trader who gave a guarantee or entered into a contract in a state of insolvency would be liable to be indicted for fraud. And it would be making, moreover, mere non-disclosure fraud, for there was nothing about solvency of the vendors in the prospectus. More than this, the only evidence of the supposed fraud was the failure of estimates upon sales which took place at a time of depression. To make out the supposed insolvency, the most astonishing perversions were attempted. Money lent by the firm was represented as liabilities, because the borrowers might fail, and then the money would be lost. Bills which had been discounted by the firm, and discharged by the acceptors, were, in like manner, represented as liabilities, although only contingent, upon the event of all the other parties to the bills being insolvent. Money, in cash, to an amount equal to the deposits held by the firm, was represented as requisite to solvency, though the whole course of a money-dealer's business implied that they would not be withdrawn until replaced. And in defiance of the whole scope and object of the deeds, it was represented that the doubtful assets, excepted that they might not be transferred and dealt with in a separate deed, because not transferred, had been transferred as absolute cash. And then, in order to make out a case of fraud as to their assets, it was represented that there was a list of them in the schedule to the second deed, so that a glance at it would have shown their amount and their worthlessness; whereas, in truth, there was no such

list, and the second deed no more disclosed their amount than the first. Such was the case for the prosecution, which, it will be observed, was quite out of the scope of the prospectus, or of any statements put forth to the shareholders, and therefore out of the scope of legal fraud, civil or criminal. And the case was indeed destroyed by the prosecutor's own evidence, for he said he had taken the shares on the faith of the prospectus; every one of the statements in which were proved to have been true. It was represented that because the firm, in transactions in past years, extraneous to their proper business, had incurred losses, therefore their proper business had ceased to be profitable, a fallacy totally destroyed by the evidence of the official liquidator, who stated that the profits of the business—the proper business—continued as high as ever until diminished by the terrible rise in the rate of interest; and which, at the same time, also by depreciating property, prevented the realisation of the estimated value of the estates. And he ascribed the fall of the company to the withdrawal of £5,000,000 of deposits during the latter part of its existence.

Such a case scarcely required an answer, as it destroyed itself, and it should have been dismissed on the mere statement of it. And the answer on the part of the defendants consisted merely upon the facts proved by the prosecution. As to the excepted accounts, it was pointed out that *the limited company in no way assumed them, and were only interested in them so far as their realisation affected the guarantee of the Gurneys.*

One of the defendants—who had made an answer in the Chancery suit—made a statement to the same effect as his answer, stating “that the excepted accounts were *not only not taken over as cash at 20s. in the pound, but were never taken over at all*; and that, at the time of the transfer of the business, they were not estimated as likely to produce to Overend, Gurney, & Co., in liquidation, more than £1,080,000 towards the reduction of the amount due from them to the

limited company, under the head of Suspense and Guarantee Account. As to the estates it was pointed out that probably no period in the history of this country could have turned out more ruinous for the realisation of the assets of Overend, Gurney, & Co.—amounting to £24,000,000—than that which has elapsed since the formation of the company, and the public were apt to overlook the effects of the unprecedented change which occurred in the commercial affairs of this country subsequently to July 1865, the *disastrous shock to credit resulting in the crisis of 1866*, and the fearful depreciation which followed in real, banking, railway, shipping, mining, and miscellaneous property, to such an extent, that many railway debentures, Lloyd's bonds, preference shares, and other securities in which Overend, Gurney, & Co. were largely interested, became most valueless."

It was said on the part of the directors, that they expressly provided that the new company should not take the lock-up or excepted accounts. The partners treated these excepted accounts as bad and doubtful, and as only worth about 4s. in the pound; and they took a deed of guarantee from the old partners against any loss to the new company in respect of the assets taken over; and they also arranged that the new company should take and carry on only the very profitable bill-broking business of the old firm, turning over £75,000,000 a year. No mistake was made in respect of the bill-broking business, for the new company, during the nine months it existed, discounted bills to the amount of £56,000,000, being at the rate of £75,000,000 a year, which exceeded their anticipations. As to the profits of this portion of the limited company's operations. These have been stated at various insignificant sums, but the directors were prepared to show that, taking rebates into consideration, the £56,000,000 of discounts gave over £100,000 profit, and it is to be distinctly understood that this amount includes no charge for interest on Suspense and Guarantee Account. Under these circumstances, they maintained that the pro-

spectus issued to the public reflected the conscientious opinion of all the directors in stating that the business contemplated by the new company would "insure a highly remunerative return to the shareholders." "It must be borne in mind that the cause of the failure of the new company was the withdrawal of deposits by the public, brought about by the loss of credit following the sales of the private estates of the old partners of Overend, Gurney, & Co. Between the end of January 1866, and the stoppage in May 1866—or less than four months—the deposits had decreased four millions!" In conclusion, they fearlessly asserted that there was no fraudulent or criminal intention on their part, and that the most that can be said was what was said by Vice-Chancellor Malins in his judgment in Mr Peek's case, when he had the whole of the facts before him. The Vice-Chancellor said—

"I think it, however, only an act of justice to the directors to add that I think their conduct shows that they could not have intended to do wrong, and what they did perhaps was the result of a too sanguine view of the prospects of the concern, and a too great reliance upon the guarantee of the partners; for each of them embarked a large capital in the company, and, though the shares rose to a premium of between £9 and £10, none of them sold any of their shares."

It might have been thought that this convincing statement—consistent as it was with the case for the prosecution, as proved in evidence, and confirmed as it was by all the written evidence, and by the testimony of the most reliable and important witness, the official liquidator, and supported as it was by the high authority of an Equity Judge—would have been deemed conclusive to show that the case should be dismissed. And no one certainly, under ordinary circumstances, could have anticipated that any magistrate would have presumed to commit six gentlemen of high character for trial on a charge of conspiracy, after an Equity Judge had declared that in their conduct in the transaction they had not been actuated by any intention to defraud! The Lord Mayor, indeed, appears to have gravely doubted whether he would be warranted in taking such a

course, for he took a whole week to consider his decision; and this again surely might have been sufficient to induce him to dismiss the case. For if, after an investigation, which itself, by repeated adjournments, had lasted several weeks, and had afforded, therefore, ample time for deliberation, he required yet another week to deliberate whether there was even a *prima facie* case against the accused, that of itself surely showed that the case was not clear enough to warrant a committal for trial—that is, in point of law (and in point of fact, if the bail required could not be provided), a committal to prison perhaps for months. Surely this is a course far too serious to be taken, when, after a careful investigation, the prosecution leaves it wholly in doubt whether there is even a *prima facie* case—that is, a case which, unanswered, would justify a conviction on the charge. For this it is, which alone will warrant a committal for trial, or the finding of a bill of indictment. This is proved, as to the former step in the proceeding, by the power to remand, in order to obtain sufficient evidence to satisfy the magistrate, and by the fact that the witnesses examined are bound only to appear at the trial; and it is proved, as to the other step, the finding of the bill, by the language of the bill itself, which states, in positive terms, that the jurors “find upon their oaths” the truth of the charge, which surely implies that the evidence is such that, unanswered, the jury on the trial ought to convict. And that they could not do, according to a well-known rule and principle of criminal law, if the evidence left the case in doubt, *a fortiori* if even on the evidence for the prosecution it was left in doubt. And here there was such a degree of doubt that, after weeks of investigation, the Lord Mayor had to take another week to deliberate on his decision. However, as the result after the week, he resolved to commit the defendants for trial. On that occasion, the Lord Mayor then said—

“Since the last adjournment, the most anxious and careful consideration has been given to the evidence adduced in support of this charge, with the

view of determining how that evidence affected the several defendants. Due weight has also been given to the arguments put forth on the last occasion by the able counsel who represent the several defendants, and I have now to announce the decision at which the Court has arrived. That decision is, that there is evidence sufficient to put upon their trial John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie. I have, therefore, to commit the whole of the several defendants for trial on this charge."

That is to say, the Lord Mayor took upon himself to commit them for trial on a charge of conspiring to defraud, though the Vice-Chancellor had declared that, in his belief, there was no such intention.

The Chief Clerk told the defendants the charge against them would be "that they, in the month of July 1865, and at divers other times, in the city of London, unlawfully did conspire, combine, confederate, and agree together, by divers false and fraudulent pretences and representations, and by divers subtle devices and means, to induce the complainant, Dr Adam Thom, and divers other persons, to become, and whereby they did become, shareholders in a certain public company—to wit, a company called 'Overend, Gurney, & Co. (Limited),' registered under the Companies Act, 1862, with intent thereby to cheat and defraud the said complainant, and the said other persons, of divers valuable securities, bankers' checks, orders for the payment of money, and divers sums of money, their property and moneys respectively, and which were acquired and obtained by the afore-said pretences, representations, devices, and means, whereby the said complainant and the said other persons were, in fact, defrauded to the amount of three millions sterling."

Upon this charge the defendants were committed for trial.

The Lord Mayor, however, intimated that he was prepared to admit the defendants to bail, each of them in £10,000, and two sureties of £5,000 each.*

Before, however, the defendants could be put upon their trial, there was yet another stage in the proceedings, and that was *the finding of a bill of indictment by a grand jury*—a step in the procedure of our criminal law of very great importance, because it affords an opportunity of checking a prosecution not resting on sufficient grounds, and pro-

* The aggregate bail tendered and accepted amounted to the large sum of £150,000. If this enormous demand of bail could not have been provided, the defendants must have been committed to prison until their trial. The fact that they could provide such bail afforded of itself a strong testimony to the confidence of their friends in their honour and character. But the amount of bail required (not at all excessive, if there was to be a committal) shows how serious a thing committal for trial is.

tecting the accused from the peril of a trial. The class of cases, however, in which such protection is most required—that is, those in which there is a peril of injustice through public clamour and popular prejudice—are precisely the class of cases in which such protection is likely to be wanting—the grand jury themselves being a popular tribunal, and not unlikely to partake in the prejudice, or feel the influence of the clamour. On this occasion the grand jury had the advantage of a charge from one of the ablest criminal judges in the country—the Recorder of London—who thus adverted to the case—

“The case to which he had alluded as an exception was a charge of conspiracy against the directors of a joint-stock company, who were accused of having been guilty of various frauds, by which they had induced persons to become shareholders of the company, and to part with their money, with intent to defraud them. It would be quite idle to suppose the grand jury were not already familiar, to a certain degree, with the case to which he had referred. It had naturally excited considerable public interest and some strong feeling; so much that it had been thought necessary by a superior court to direct that, in the event of a bill being found, the indictment should be removed from this court, in order that the defendants might be tried there. He was, however, sure that whatever they might have heard in reference to the case, they would confine themselves to the evidence, and examine it with the calmness and deliberation which almost invariably characterised men acting as a grand jury. It appeared from the depositions, which were voluminous, that for many years prior to July 1865, the business of bill-brokers and money-dealers had been carried on in the city of London by the firm of Overend, Gurney, & Co., and had been exceedingly profitable. For four years previously, however, to July 1865, the partners in that firm had embarked in various undertakings and transactions which differed materially from their ordinary business, and upon these a great loss in the aggregate had been incurred. Notwithstanding those transactions, and the losses likely to arise or which had arisen upon them, the evidence of one of the accountants went to show that the ordinary business of the firm, which was that of bill-brokers and money-dealers, had been of a profitable nature up to that time, but that a large sum of money, in consequence of the exceptional transactions, as he might call them, in which the firm had engaged, had been locked up, and the grand jury would probably come to the conclusion that, under the circumstances, it would have been almost impossible for them to have carried on the business for any length of time without the introduction of a very large amount of fresh capital. He supposed with that view negotiations were set on foot. It was no doubt thought the shareholders would bring in a very large amount of capital, and that the old firm would be thus enabled to overcome the difficulties arising from the exceptional transactions in which they had

engaged. On the 13th of July 1865, a prospectus was issued (which he read), and in consequence of its issue a very large number of shares was applied for—he thought about as many as 224,000—and of those 83,384 were allotted to the general applicants, and 16,666 were retained as part payment of the good-will, which, as the grand jury would remember, was £500,000, one-half being paid in cash and the remainder in shares of the company, with £15 a share credited upon them. The 16,666 shares at £15 would make £250,000, which was to be one-half the price of the good-will. The shares were allotted between the 24th and the 28th of July; the limited company was then complete, and the business of the old firm was transferred to it on the 1st of August. A deed, called a deed of covenant, was referred to in the prospectus, and that was to be seen at the office of the company. Such a deed was accordingly prepared, and by that the whole business of the old firm was to be transferred to the limited company. The whole of the then existing assets were also transferred, and the liabilities, with this exception, that the limited company was to be at liberty to reject any portion of the business to which they objected, and the old firm guaranteed the payment of all that appeared as assets on the face of the books of the company. That was the deed upon which the business was transferred. There was, in addition, a second deed prepared, and which was described as an arrangement on the basis of the contemporaneous indenture which was the deed of transfer. By that second deed, which went far more minutely into matters referred to generally in the first deed relating to the accounts to which the new company were to be at liberty to object, certain books were to be kept in reference to accounts which the new company refused to have anything to do with, and which were to be guaranteed by the old firm, with an undertaking to make good the whole amount of the various assets. That deed went much more particularly into the nature of the transactions than the other. It appeared the old firm, besides the ordinary business of bill-brokers and money-dealers, had entered into exceptional transactions, advancing large sums of money on securities of shipping and railway shares; and in consequence of moneys advanced to the contractors by which those railways were to be constructed, a sum a little above £4,000,000 was locked up on those various transactions. That was previous to the transfer, and no doubt it had been then ascertained that a large amount would be lost. As against that £4,000,000 there was a sum of above £1,000,000, which stood to the credit of the partners in the old firm, and which they had not for some years previously to the transfer been in the habit of dividing. It was agreed that the £1,000,000 should be set, in the first instance, against the £4,000,000 of bad or doubtful debts, which would reduce the amount to about £3,000,000. It was further proved that the sum of £250,000, one-half the amount of good-will, was to be also set against any loss that might accrue on the excepted accounts, while upon the £250,000 worth of good-will shares the new company was to have a lien, and any money arising from the sales of the shares was to be transferred to the excepted accounts. So that £1,000,000 stood to the credit of the old firm in the private ledger, and £500,000, either in cash or shares, was also to be placed to their credit, and there was the price to be allowed for

the value of the premises in which the business had been previously conducted, and which appeared to have been £26,000. It did not seem to have been contemplated at that time that there would be a total loss on the debts, nor was there ; but any dividends that might be obtained on the £4,000,000 would have to be set off against that amount, and for anything beyond which was not discharged the new company would have nothing to look to but the guarantees of the partners of the old firm, who were possessed of very large private estates, likely to realise a very considerable sum. That seemed to have been the transaction between the parties at the time of the transfer ; and he called the attention of the grand jury to the second deed, asking them, as mercantile men, to pay particular attention to it, because part of the evidence arose from the fact that only one deed was referred to in the prospectus, and that was placed in the hands of the solicitors, to be shown to persons desiring information in reference to the company. It did not appear there was any great curiosity to know the contents of the deed ; but there was evidence that one person did go to the office of the solicitors and look at the deed, and his statement was that, if he had known there was a second deed, he should not have become an applicant for shares. He supposed the witness meant that if he had thought a deed had been concealed from him, the circumstance would have excited suspicion in his mind. It appeared to him (the Recorder), he confessed, that the legal effect of the second deed was very much the same as the first. There was a further provision in the second deed, and that was rather in favour of the shareholders, because it limited the time in which the excepted accounts were to be held in suspense, and the partners in the old firm were bound to make good the deficiency in a certain period of time ; but the effect of both deeds was, that the shareholders were to have the guarantee of the partners in the old firm, and the security they gave was the value of their private estates. The business was then carried on by the new company, and so far the transfer seemed to have succeeded that they were enabled to retain the greater portion of the business carried on by the previous firm. They did not appear to have engaged in any exceptional transactions, such as had caused the ruin, as he might call it, of the old firm. In the old business, a sum of £76,000,000 was turned over in a single year, and during the nine months of the limited company's existence, between £50,000,000 and £60,000,000 was turned over. According to evidence on the depositions, that would naturally be a business which, if conducted with ordinary skill and prudence, would result in a large amount of profit. But those profits upon a business which had reached an almost startling amount had been swallowed up, and, in point of fact, no profit at all was realised. He supposed the times were not then favourable for conducting such undertakings, and probably no time could have been worse for realising securities. The business was carried on for nine months, and in May 1866 the limited company stopped payment. Various inquiries were set on foot, accountants were employed both in the interest of the shareholders and of the creditors of the new company, a large sum had been spent with the view to a full investigation, which had been going on ever since, and it was only towards the end of the past year that this

charge of a criminal conspiracy was preferred against the directors. The immediate cause of the stoppage of the new company appeared to have arisen from a circumstance which one was surprised had not been foreseen at the time of the original arrangement. The jury would remember that the new company had to look to the private estates of the different members of the old firm for making up any loss which might be sustained from the realisation of the assets that were to be transferred, and in order to provide for some of the losses that had been sustained the partners in the old firm commenced selling their estates. The moment that was done the credit of the new company seemed to have been affected, and four months after that no less a sum than £4,000,000 was withdrawn from the deposits of the firm. It was stated in evidence that that was the immediate cause of the stoppage, and the knowledge that the loss had been such as to render it necessary for the partners to sell their private estates in order to meet that deficiency, resulted in an utter loss of confidence in the company. It would not be necessary for him (the Recorder) to go into the details. A great deal of the evidence turned upon long and intricate accounts; and the only way in which he was likely to be able to assist them in the investigation was to call their attention to the charge itself, the nature of the evidence generally, and to state what he believed to be the principles of law by which they should be guided. The charge against the defendants was not that they had been guilty of negligence or carelessness by which the shareholders or any of them had been misled, but whether they had been guilty of a conspiracy to induce persons to become shareholders with the view of defrauding them of their money. That was the charge which the prosecutor would have to make out. There was first the general evidence as to the effect of the second deed not referred to in the prospectus, and not laid before the persons who proposed to become shareholders. Whether that was material or not would depend very much on the construction the grand jury, as mercantile men, might put upon it, and that men like themselves would be likely to put upon it if both deeds had been laid before the public. What they had to consider was, whether it intended to establish a *prima facie* case in support of the charge. They would probably look at it with the care and intelligence they were accustomed to exercise as mercantile men, but what struck him was the probable effect on the mind of an intending shareholder, and he thought more particular attention was called to the excepted accounts in the second deed than in the first. The second circumstance to which their attention would be called would be the fact of the large amount of loss sustained by the old firm, and they would have to consider whether the directors were justified in stating that the transfer of the business, with a price of £500,000 paid for good-will, was likely to produce, in the words of the prospectus, 'highly remunerative returns.' When he said justified in coming to that conclusion, they must come to a conclusion much more unfavourable than that in order to support a criminal charge. They must be satisfied, not only that they were not justified in coming to that conclusion, but that they did not believe the statement in the prospectus that it was likely to produce 'highly remunerative returns.' In order to support the criminal charge, the question was

whether in that statement they alleged what they knew to be untrue, and did so with a fraudulent intention. Coming to the effect of the losses that had been sustained, they would have to consider whether those losses, arising from the excepted accounts, were such as to render it almost impossible that they could be counterbalanced by any assets that could be produced. They would look carefully at all the evidence on that subject. It was not because a thing had turned out unfortunately, and there had been an immense loss, that they would come to the conclusion that the directors contemplated that loss in the first instance. One or two circumstances would be placed before them as to statements made by some of the directors not long before the transfer of the business. There were some letters in which some of the directors, writing not long before the closing of the concern, spoke of the business being carried on satisfactorily, and that no serious losses had been sustained; but the main portion of the charge was not the manner in which the business was carried on, but the fraud in its inception—namely, in inducing persons to become shareholders. What they would have mainly to direct their attention to was the prospectus, which was rather bare in details than otherwise. Certainly, the immense application there was for shares might have proceeded from the almost universal confidence among the mercantile public in the concern, which had been carried on for a great many years, and which was about to be transferred, and from the reputation of the profits arising from it. In referring the losses to the circumstances relied on in making good the charge, a good deal of that would depend on the evidence of the accounts. He ought also to call their attention to certain facts in the case which were undisputed, and which tended to rebut the charge brought against the directors. Undoubtedly, as to the three directors who had been partners in the old firm, they seemed to have had a considerable object in the formation of the new company, because it was the only chance they had of retrieving the losses they had previously incurred. It could hardly be doubted that whether it would produce any ultimate benefit to them would depend on the new company coming out prosperously; but with respect to the three other defendants and the director who died, they embarked very large sums in the concern, and the grand jury would have to say how far that removed the suspicion that they could have been influenced by fraudulent motives in inducing others to become partners in an undertaking in which they themselves had advanced large sums of money. Mr Gibb, the director who had since died, took 1000 shares, paying calls of £15 per share, amounting in all to £15,000, and leaving his estate liable, in addition, for £35,000, the amount of further calls that might be made in the course of the liquidation. Mr Ford Barclay took 1000 shares, paying £15 a share on allotments, and two calls of £10 each afterwards, making £35,000, and he still remained liable for another £15,000, if that should become necessary, in order to satisfy the creditors of the limited company. Mr Gordon took 200 shares; Mr Rennie took originally 500—300 for himself and 200 for a firm in which he was a partner—but he gave up 99 of them in order to satisfy the public applicants for shares, and he held to the last the shares which he had taken for himself and his partner. All the rest of the four directors likewise retained to the last the shares they

had taken on the formation of the concern. That, no doubt, was a circumstance the grand jury were bound to consider in coming to a conclusion on this matter. He did not think there was any other point upon which he need address them. He had told them the specific charge, and they must be satisfied, not only that the defendants had been guilty of carelessness or of negligence, not only that something had been done by them to justify civil suits being commenced against them in order to make their estates liable, but they must be convinced that they had been guilty of direct fraud, and that the object of that fraud was to induce persons to become shareholders with the intention of defrauding them of the moneys they might embark in the company. Looking at the whole of the evidence, favourable and unfavourable, it was for them to say whether a *prima facie* case had been made out sufficient to justify a conviction, or to justify the defendants being put upon their trial."

It was generally understood, and will, it is conceived, be apparent from the tenor of the charge, admirably unimpassioned and impartial as it was, that its tendency was to a dismissal of the bill, and, at all events, it strongly pointed to a more calm and dispassionate consideration of it than the public excitement at the moment appeared to have allowed; and as the depositions disclosed the fact that the Vice-Chancellor had acquitted the defendants of any intention to defraud, no one can doubt that the tone of the Recorder ought to have led the grand jury to dismiss the bill. Under circumstances of extraordinary excitement, however, they found the bill of indictment which had been preferred, and the trial of which it is now proposed to report.

Previous to that, however, it is necessary, in the history of the case, to mention that an application was made to the Court of Queen's Bench to remove the indictment into that court for trial, which would have the effect of securing a little salutary delay, affording time for public excitement to cool down, and also removing the case to a higher area, or to a calmer and clearer atmosphere than of the central criminal laws. The affidavit upon which the application was made stated—

"That in the course of the investigation of the charge, before the Lord Mayor, accounts of an exceedingly voluminous and complicated character were discussed, and a great number of questions arose requiring for their solution familiarity with mercantile, banking, and financial affairs, and

that it was essential that the case should be tried before a special jury, whose services could not be obtained unless the writ of *certiorari* was granted. The affidavit further stated that questions of law of difficulty were likely to arise, and, among others, questions as to the construction of the prospectus issued by the defendants, and the deeds executed upon the transfer of the business of the old firm to the new company. That upon the hearing of the summons, it was contended for the prosecution that one of the deeds prepared for the transfer of the business had been fraudulently concealed, and that the effect of the deed concealed was to cast on the limited company liabilities which were not disclosed by the deed referred to in the prospectus, and submitted to the inspection. The affidavit stated that the defendants were advised and believed that upon the true construction of the two deeds, there was no substantial difference between them as to the liabilities imposed on the new company, and that the second deed contained no more than the details of the arrangement described in the deed submitted for the inspection of the public. The affidavit went on to refer to the strong feeling against the defendants exhibited by those present at the inquiry before the Lord Mayor, and stated that it was important that the case should be tried before a special jury to secure a fair and impartial trial."

Upon these materials, the Lord Chief-Justice observed, as to a change of venue, that—

"There might be another advantage in a trial in this court, removed from the excitement which appeared to have existed in the city of London on the subject."

The writ was accordingly ordered to be issued.

Thus the case stood for trial in the Court of Queen's Bench.

But here arose a practical difficulty which at once illustrated the defects of our system of criminal procedure, and threw a strong light on the legal and the moral events of the case. The prosecution would involve a considerable expense; and although the recognisances given by the defendants on removal of the case for trial in the superior court rendered them liable for the costs, in case of *conviction*, there was no provision for costs in case of *acquittal*, otherwise than by the exercise of a discretionary power vested in the judge by statute—a power not likely to be exercised in favour of a prosecution instituted in direct defiance of the declared opinion of a judge in equity. It was no doubt certain that the prosecution was certain to

fail in a fair and important trial, and hence some anxiety was felt as to the question of costs.

If indeed the shareholders, as a body, or even any large number of them, had taken any interest in the prosecution, there would have been no difficulty, if indeed the legal principle, that parties interested may combine to support legal proceedings, applies to criminal prosecutions—as to which, indeed, there may be some doubt, the theory of law being that, in criminal prosecutions, the public at large are interested, and no individuals more so than the general body of the community.* Practically, however, there would probably have been no great difficulty if the body of the shareholders had approved of the prosecution, or taken an interest in it. But then they did not approve of it, and took no interest in it; at all events, no interest sufficient to induce them to come forward to support it.

An attempt was made to elicit their support by means of subscription, but in vain. And now arose the anomaly of a criminal prosecution professedly instituted on behalf of the public, and in the name of the Crown as representing the public; and in which, nevertheless, the public, and even that portion of the public who were more nearly interested, really took no interest, and which they declined to support. It was afterwards remarked by the Lord Chief-Justice of England that the case had deepened in his mind the impression now amounting to a conviction, that our system of criminal procedure, which left the conduct of prosecutions in the hands of private individuals, was more indefensible, and that a public prosecutor was necessary to the due administration of justice, either, on the

* The offence of maintenance is committed where parties not interested conspire to institute or resist legal proceedings; but in civil proceedings, it is not committed where the parties have an interest, and it is probable that a subscription to defend a person prosecuted might be legal, if it were from an honest sense of justice, and only to secure the accused a definite legal assistance. But combinations to support prosecutions have, it is manifest, a dangerous tendency to prejudice the accused; and it is doubtful how far the excuse of interest could be set up by individuals, in prosecutions, where the whole community are supposed to be equally interested, and where the Crown is the guardian of public justice, and will, it is presumed, take up a prosecution if it be a proper one. In the present case, however, probably shareholders might have subscribed.

one hand, in order to prevent an improper prosecution from being proceeded with; or, on the other hand, to insure that a proper prosecution should be properly conducted. In this instance, after the case was over, the Lord Chief-Justice declared his conviction that it was an improper prosecution, at all events as against the new directors—an opinion which apparently involves, in logical consistency, the same view as to the others (for reasons already explained); and, at all events, it was manifest that if they had not been included, their testimony must have cleared the others, which, perhaps, was the reason why they were included and indicted, in order to exclude their evidence. Beyond all doubt—as it has now been declared on the highest authority on such a question, the Lord Chief-Justice of England—it was, as it had been instituted, an improper and unjustifiable prosecution. And, as already observed, it had been instituted in defiance of the declared opinion of a Chancery Judge. No wonder, therefore, that the shareholders took no interest in it, and would not support it.

Under these circumstances, however, the attorney who had hitherto conducted the case for the prosecution actually applied to the Crown to take it up! It need hardly be said that the Crown declined to do anything of the kind, or to have anything to do with such an improper prosecution. And the matter having been mentioned in the House of Commons, the Prime Minister fully upheld and adhered to this resolution, and enforced it by some observations which appeared to command the assent of the House, and certainly commanded the approval of the great body of the community.

The prosecutor, then, as a last resource, betook himself to the Court of Chancery, the very court in which he and other shareholders had civil proceedings pending, and before the very judge who had publicly declared his opinion that there had been no fraudulent intention on the part of the directors, an opinion which was of course fatal to any *legal* proceedings, civil or criminal. Such an

audacious application was of course utterly unsuccessful. It was made in the first instance, indeed, before the Chief Clerk, who, however, referred the matter to Vice-Chancellor Malins, who refused the application.

Shortly before the trial was expected to come on, the prosecutor's attorney applied by summons in the matter of Overend, Gurney, & Co., that the costs of the criminal prosecution against the directors should be paid by the official liquidators out of the assets of the company. The matter came before the Chief Clerk of Vice-Chancellor Malins, and was attended on the part of Messrs Harding and Turquand, the official liquidators, who opposed the application on the part of the shareholders.

The summons was on the part of "Adam Thom, a shareholder," and it ran thus—

"That, it appearing that John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, Henry George Gordon, and William Rennie, directors of the said company, have been guilty of offences in relation to the company, for which they are criminally responsible, and in respect of which the said John Henry Gurney, Henry Edmund Gurney, Robert Birkbeck, Henry Ford Barclay, George Henry Gordon, and William Rennie, stand indicted to take their trial, the Court doth direct that Robert Palmer Harding and William Turquand, the liquidators of the said company, do conduct the prosecution for such offences, and that Messrs Lewis and Lewis, the present solicitors representing the Crown, be continued such solicitors, and that the costs and expenses of the applicant in the said prosecution up to the present time, and of this application, and of the said liquidators in the said prosecution, be paid out of the assets of the said company."

The Chief Clerk at once excepted to the wording of the summons, in which it was made to appear that the parties were guilty of the offence. It was an application for funds to prosecute, and the first part of the summons alleged that they were guilty. The summons, he thought, should be amended. And it was so amended.

The attorney, in support of his application, urged that "it was just the case in which the assets of the company should be applied to the prosecution. It was certainly a case of very great importance, involving almost national interests, and it could not be expected that Dr

Thom could furnish the means for the prosecution." He, however, failed to show this, and when the Chief Clerk asked if he had any cases in support of the application, he referred to none which appeared to the Chief Clerk satisfactory. The Chief Clerk inquired whether the application was backed by the shareholders generally. To which the answer of the attorney was, "that he *appeared for a shareholder*, Dr Thom, and had a right to make an application." That is, for a *single* shareholder. *He could not get one other shareholder to sanction the prosecution.* And no wonder ! Yet, he said, "he had a right, under the Act, to appear for a shareholder or creditor. He could not conceive a case of greater importance than the present. The matter had been before the shareholders, and a true bill had been found. An application was made to the Home Office, and the case went before the House of Commons, and Mr Gladstone said it was a matter for the shareholders." A highly sensible observation surely ! It certainly was a matter of, he might say, national importance. But the Chief Clerk said, "Perhaps the shareholders as a body might not feel disposed to spend any more money." To this it was answered, that the question was, under the Act of Parliament, for the judge and not for the shareholders to decide. What the shareholders thought about it was plain, for an attorney, on their behalf, said he certainly should oppose the application. In the result, the Chief Clerk intimated that it was a case of so much importance that he should refer it to the Vice-Chancellor. It was accordingly so referred, and the Vice-Chancellor dismissed the application.

In order to meet the difficulty thus arising from the want of funds to conduct the prosecution, it was proposed that the prosecutor should conduct it in person ; but this would have been contrary to the settled practice of superior criminal courts, and contrary to convenience and public policy, as it would tend to mix up the functions of prosecutor, advocate, and witness. Hence it has been

held that a prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel.* And in a criminal case a party has no right to confound the function of witness and advocate.

And although in criminal courts it is the practice for barristers to plead without the intervention of attorneys, and taking their instructions only from their clients, this has never been usual except in cases of prisoners, who may not have funds to instruct attorneys; and in the time of Lord Campbell it was pronounced by the Court of Queen's Bench more convenient for the satisfactory administration of justice that the ordinary practice of instructing counsel

* *Rex v. Brice*, 2 Barnwall and Alderson's Reports, 606; *Rex v. Milne*, 2 *Ibid.*, 606. And see 1 Chitty's Rep., 602; Archbold's Criminal Pleading, 86; *Rex v. Arnold*, 7 State Trials; Dickinson's Quarter Sessions, 122, citing *Rex v. Stoddart*, before Lord Tenterden, who refused to allow the prosecutor to appear in person as advocate. On that occasion Lord Tenterden said, addressing the prosecutor:—"If it be your intention to address the jury, it is a course which you will not be permitted to pursue. It has been determined by all the judges of the Court of King's Bench, with the concurrence of many of the other judges, that a prosecution by indictment is not, in point of law, the suit of an individual. If an individual seeks redress, his course is to bring an *action*. If, instead of that course, he thinks fit to put the law in motion in the name of the Crown for the sake of public justice, it is not his suit, but the suit of the Crown. Where a person, therefore, chooses to proceed by indictment, he has no right to address the jury, unless he be a gentleman of the bar. That opinion has been solemnly pronounced by all the judges of the Court of King's Bench. We have at every assizes prosecutions instituted certainly by private individuals, in which the name of the sovereign is used; but in none of them is it ever thought that the person prosecuting has a right to address the jury. The course taken on any occasion of a criminal prosecution is where there are depositions that the judge refers to them, and examines the witnesses according to the depositions. Where there are no depositions, it has been usual for the judge to consult the person prosecuting as to the manner of bringing his case before the court, and as to the witnesses proper to be examined. That is the course of proceeding I mean to adopt on the present occasion." That, however, was a simple case of libel, and it is obvious that it would never be applicable to a complicated case such as the present. The attempt on the part of the judge to conduct the case by examining the witnesses from the depositions would have been perfectly idle and impracticable. Even in ordinary cases, as every one is aware who has ever attended the assizes, judges are in the habit of handing down depositions to counsel to conduct the prosecutions in cases where counsel have not been instructed; and have often made remonstrances against their being placed in the position either of resorting to that course, or of having to attempt the impracticable task of examining the witnesses while trying the case,—in other words, being counsel for the prosecution, at the same time that (in theory of law) the judge, in the absence of counsel, is *counsel for the accused*. And certainly it has always been an invariable rule, either in a civil or a criminal case, that a party cannot act as *counsel* and also be examined as *witness*. And in this case the prosecutor was a witness. A person who conducts a cause as advocate cannot be examined as a witness therein; and if he is so examined, the Court will grant a new trial on that ground. (*Dunn v. Packwood*, 1 B. C. Rep., 312; 11 Jur., 242—*Erie, J.*, 8 P.; *Stones v. Bacon*, 4 Dowl. & L., 396; 1 B. C. Rep., 243; 16 Law J., Q. B., 32; 11 Jur., 44—*Patteson, J.*)

through attorneys should prevail.* Certainly there would be manifest impropriety in a case of such magnitude as the present being brought into court without proper professional assistance.

In consequence of an intimation by the Lord Chief-Justice that he should not allow the prosecutor to conduct the case in person, and the refusal by the Government to undertake the case, a discussion took place in Parliament upon the subject, which has great interest as part of the history of the case. A member of the House of Commons (Mr Eykyn) first asked a question on the subject.

"Mr Eykyn asked the Secretary of State for the Home Department whether, in refusing to undertake the further prosecution in the case of *Regina v. the Directors of Overend, Gurney, & Co. (Limited)*, and also refusing to furnish a sum not exceeding £5000 towards the cost of that prosecution, he was aware that the directors had been committed by the Lord Mayor of London to take their trial upon a charge of conspiring to defraud the public of £3,000,000 sterling, and a private individual bound over in £5000 to prosecute the law with effect; that a grand jury of merchants had found a true bill, and that the Lord Chief-Justice had ordered the directors to find sureties for £10,000 each to appear; whether the law officers of the Crown had advised such refusal, and on what grounds; and whether the law incapacitated the prosecutor from appearing in person; and, if so, who was responsible for the prosecution of the case on the trial and the due administration of public justice?"

To this the Secretary of State (Mr Bruce) made the following reply—

"I was aware of the facts referred to in the question of the hon. gentleman. I must say I did not consult the law officers upon this occasion, but I did bring the matter before the Cabinet, where it received due consideration, and the Cabinet were of opinion that there was nothing in the circumstances of this case to distinguish it from ordinary cases of fraud, where the prosecution must be conducted by the sufferers themselves. The only precedent that I know of was that of the British Bank, the prosecution of which was undertaken at the cost of the Government, and that was regarded not so much as a precedent to be followed as an example to be avoided. From time to time similar applications have been made to the Government, and all have received the same reply. During the last term, an application was made to Government to furnish the costs and undertake the prosecution of the directors of the Leeds Bank. That application was also refused. Still less can the Government undertake to furnish a contribution towards a prosecution, the conduct of which does

* *Doe & Bennett v. Hale*, 15 Queen's Bench Reports.

not rest in their own hands. I am aware it is said that there is an inconsistency on the part of the Government in this matter, and that they acted very differently in the Rachel case. But that case was entirely different. The question at stake in the Rachel case was whether the Judge of the Sheriff's Court, when sitting in a Criminal Court, had properly exercised his jurisdiction; and on the decision in that case rested the legality of many previous decisions, so that the matter was of great public interest. My hon. friend asks me whether the law incapacitates the prosecutor from appearing in person. The prosecutor has power in civil cases to appear, but the Lord Chief-Justice has laid it down to be the rule and practice of the Courts that prosecutors in criminal cases should not appear in person. With respect to the question as to who is responsible for the prosecution of the case on the trial, I can only answer that this case rests exactly on the same footing as other cases. Cases of this kind are extremely rare. But this is not the occasion for entering upon the question whether cases of this sort should be prosecuted by the Government. All I can say is, that it is not the practice. The Government, after mature consideration of the subject, did not believe that the circumstances of this case furnished sufficient reason for an exception to the general rule."

Mr Eykyn upon this gave notice that he would call the attention of the House to the subject.

Another hon. member (Mr Fawcett) asked whether there was any law to prevent a solicitor from appearing? To this Mr Bruce replied that he believed there was no law, but he did not undertake to say what was the practice of the Courts. In certain cases he knew there was a rule that barristers alone should be heard.*

On a subsequent day a discussion on the subject took place, in consequence of some observations by the hon. member (Mr Eykyn) who had first brought the subject before the House, and in which he rather entered into the merits of the case, and made other remarks of a general character. He said—

"In the year 1865-66, the Stock-Exchange Committee had permitted companies, whose aggregate capital amounted to £34,700,000, to come before the public, the whole of which were in liquidation within the following year. Under these circumstances it was clear that the initiation of these companies ought not to be left under the sole control and supervision of the Stock Exchange. The effects upon public morality of cases of this kind were most deleterious, and they created a most unfavourable impression abroad. The matter had passed through an ordeal which rendered it imperatively necessary that all proceedings in reference to it should be

* *Vide ante*, p. 82.

conducted by the Government, and not left in the hands of private individuals. Dr Thom had already expended all the money he could spare in conducting this prosecution, and an application he had made to the Treasury for assistance had been rejected. The Lord Chief-Justice of the Queen's Bench had stated during the day that he must decline to hear Dr Thom otherwise than by counsel; and therefore, when the case came on to-morrow, unless the Government took the matter up, the prosecution must of necessity fall through. The case rested now entirely with the Lord Chief-Justice, with the Government, whom he regarded as distinctly responsible for the issue, and with public opinion; and if the prosecution were allowed to drop, it might be truly said that there was one law for the rich and another for the poor. In most other countries there was a public prosecutor, and Lord Brougham and other eminent legal authorities had suggested that such an officer should be appointed in this country. A former Government had not hesitated to direct its law officers to prosecute in the case of the British Bank, and he did not see where the difficulty lay in following the same course in the present case. The outlay in that prosecution might have been great, but the effect in commercial circles was such that it was money well laid out. The Lord Mayor had investigated the case for seven days, and had committed the defendants for trial. A jury of merchants had confirmed this course, and if the prosecution were not consummated, it would be almost a scandal upon the Government."

Other hon. members remonstrated forcibly against a discussion which tended to prejudice the fair trial of the case. Thus Mr Fothergill, who spoke with more effect *as being a shareholder*, had the manliness and generosity to speak as follows—

"He could not agree with the hon. gentleman that those who went into this concern, hoping to make large gains, but who made instead great losses, were to come to that house and ask them to supply the funds of the country to carry on a prosecution which was the result of their own angry feeling. He spoke on this occasion as a sufferer, for, contrary to his usual habits, he took 100 shares in the company, whereby he had sustained a loss of £4,000. He had consequently taken a great deal of pains to understand the case, and if he thought he had been defrauded, he would have been one of the first to commence such a prosecution. He had not, however, as a shareholder, done what other shareholders had attempted to do—namely, to repudiate the debts of the company. Of one thing he was certain, *that if that attempt had succeeded, they would have heard nothing of this prosecution.* The reason why this claim was now made was on account of the *magnitude of the operation and the disappointment of those who took part in it*, but he did not see why the case on these grounds called for any exceptional legislation. He was not acquainted with the defendants except in the ordinary course of business. He had, however, trusted them in the business transactions of many years with vast amounts, and he might have been plundered to almost any extent, but he had always found their honour

perfect. This had, to his mind, too much of the character of a vindictive prosecution, and was only to be explained by the injustice and cruelty incident to angry disappointment; he therefore protested against the proposal that the money for carrying it on should come out of the pockets of the tax-payers."

And in the same spirit another hon. member (Dr Dalrymple) said—

"He also had been no small loser by the company, but he *would neither defend them, nor would he, on the other hand, assist in supplying materials for the opening speech of a prosecuting counsel on the eve of a great trial.* There had been too many sensational articles in a portion of the Press on the case, but he had not expected that an opportunity of raising a sensational discussion on this question would have been made in the House of Commons. That was, at any rate, the effect of the discussion raised that night. He had had a life-long acquaintance with the gentlemen concerned, and his opinion was, that the prosecutor had no claim to ask for the public money to carry on this prosecution. Dr Thom had appealed to the shareholders for money to carry it on, and whether the money had been otherwise spent upon the case, or whether they had not responded to Dr Thom's calls, in either event he had no claim upon the public funds. If after the trial it should appear that there had been a default of public justice, that would be the time to raise the grave question of the appointment of a public prosecutor."

Another hon. member, however (Mr Fawcett), was not deterred by these admirable observations from entering still more warmly into the merits of the case. He said—

"He denied that the demand for this prosecution arose from any vindictive feeling. The strongest plea for it was, that justice to those who were accused demanded a fair trial. Here were men of great name—almost of historic character and of European reputation—accused of a terrible crime. That was the prosecution in the case of the British Bank, and he had heard it remarked by commercial men, that no expenditure had produced a more salutary result than that which occurred in that case, because it proved that the Government were ready to prosecute men, however high their position, who had committed fraud against the public. The right hon. gentleman said that this was not an exceptional case. From that statement he emphatically differed. In an ordinary and simple case, where no counsel appeared for the prosecution, the judge would look over the depositions, or hand them over to a barrister; but, from the nature of this case, it was impossible for the judge to take that course in the present instance. He would say, in conclusion, that no one could exaggerate the mischief which the break-down of this trial would occasion. The course which the Government proposed to pursue would cause a public distrust in the administration of the law, because people would say that if the sum involved was small, some £5 or £10, the accused would have been brought to justice, but when millions of money were concerned, then the accused

escaped altogether from trial. He trusted that in the interests of British commerce, and the national reputation, the accused might be declared not guilty, but he believed that it would be regarded as a great failure of justice and a national scandal if, for want of a public prosecutor, the trial entirely fell to the ground."

Happily it did not fall to the ground; but what if it had? It was strange that it did not occur to the hon. member to consider that, if there were any difficulty, it arose from its being the belief of the shareholders that there had been *no fraud*; or, at all events, from the absence of any such real and general belief that they had been defrauded, as could induce them to take part in the prosecution. And it was strange that he did not remember that the Vice-Chancellor had declared that there was no actual or intentional fraud, and had also determined that there was not even equitable fraud; a decision which, a few weeks afterwards, was affirmed by the Lord Chancellor. Of course, under such circumstances, it would have been monstrous for the Government to take up a prosecution utterly untenable. They declined to do so, and the Home Secretary said—

"He fully admitted the magnitude of the issue to be tried to-morrow in its bearing on the commercial morality of the country, but the question was, whether the Government was exceptionally to find the prosecution with funds. With one exception, the Crown had never interfered in these prosecutions. That was the case of the Royal British Bank. Since that time there had been three very remarkable cases of alleged commercial fraud without any interference on the part of the Government. In the case of the Royal British Bank, the cost incurred was £20,000. That was in 1857. Was it meant to be said that since that time there had not been great commercial frauds spreading deep disaster on all sides, and causing enormous losses to both rich and poor? Were not these cases entitled, on a fair consideration of commercial morality, to the interference of the Government as well as this case? The Government was bound to act on some definite principle. If the House was dissatisfied with the practice of the Government, they ought long ago to have raised this question. There had been cases of gross misrepresentation, cases of fraudulent dividends, cases of the grossest breaches of honesty and commercial morality, and on no occasion, except the one referred to, had the Government contributed to the expenses of the prosecution; and even in that case, upon a consideration of the whole facts, the Secretary of State, who directed the prosecution, was of opinion that the course then taken should not be repeated. Certainly when an application was made last year in a somewhat similar case, his predecessor in office refused to take part in the prosecution.

This was not a time to raise the question whether there ought to be a public prosecutor. There might be great authorities—perhaps there might be a preponderance of authority—in favour of the appointment of a public prosecutor; but although the question had been repeatedly raised, Parliament had not thought fit to legislate on the matter. Had there been a public prosecutor, the course of proceeding would have been very different from that which the Government was now asked to pursue. All the materials would have been submitted to a competent officer, and thoroughly examined into; and that officer would have determined what course should be taken, with a full knowledge of all the circumstances of the case. He was told that in Scotland, in a case somewhat similar to this, though not of the same vastness, the facts which appeared very strong against the directors had been submitted to the Lord Advocate, who determined that they were not sufficient to justify a prosecution, and no prosecution was instituted. But here the Government were called upon to intervene without a knowledge of the facts of the case, because in a private prosecution, upon evidence taken in a few hours, the grand jury had found a true bill against the accused. *It was quite possible, if the whole of the proceedings from the first had been submitted to the judgment of a practised lawyer, he might have been of opinion that there was no case at all.* He was not giving any opinion; he entirely applauded the conduct of those members who had spoken in this case and abstained from expressing any opinion of their own. But when the hon. member for Brighton asked for a contribution of £5000 towards the expenses of this trial, it should be remembered that the Government would not have the direction of the prosecution. He was not quite clear that the course taken by the Attorney-General in the case of the Royal British Bank of filing an information might not have been taken in this case; but no application was ever made to the Attorney-General to file an information; and when Sir Richard Bethell was applied to in the Royal British Bank case, he stated that it was only after the most careful and thorough examination into all the papers that he was satisfied that there was a case that would justify him in undertaking it. But it was a very different thing to be asked to intervene at an advanced stage of the proceedings, and to give the weight of the Government to this prosecution. It should also be remembered that the persons interested in the prosecution had ample means to conduct it. In that very house they had the hon. member for Merthyr, a millionaire, who, with another hon. gentleman, who had spoken, was a shareholder, yet both had determined not to contribute towards the expenses of the prosecution. Besides, since the prosecution in the case of the Royal British Bank, an Act had passed which gave great facilities to the prosecutor. By the Act of 1857, incorporated with the Criminal Procedure Act of 1860, proof of these cases was rendered more easy, and the judge had power to give costs to the prosecutor, so that he did not carry on the prosecution entirely at his own risk. Under all the circumstances of the case, the Government did not think they were specially called upon to make this case an exception to the ordinary rule. If the House was discontented at the possible failure of justice, they should long ago have legislated so as to prevent a failure of justice. Was it to be contended that during the last twelve years there

had not been cases of enormous mischief arising from alleged fraud ; and why was this case of all others to be chosen as an exception to the general rule of Government interference ? Was it because it stood as five to three, or four to two ? Surely they must proceed on some other rule. If blame was due anywhere, it was to Parliament that must be attributed the mischief arising from the want of a public prosecutor. Parliament shrunk from applying a remedy, and having done so, it seemed not fair or just to fasten on the Government a censure for refusing to bring funds and the weight of their influence to bear on this special case."

This view was supported by many able members. Mr Gilpin, who had himself suffered from the failure of the company, spoke, to his honour, in the following spirited and generous tone. He said—

"He should like to have heard from the hon. member who had opened it what end he intended to serve by bringing this subject before the House. The public had not undertaken this prosecution, the Government had not undertaken it ; a private individual, injured in his own opinion, took the opportunity of prosecuting those who he believed had injured him. That gentleman got the offending persons committed for trial, and the Government had nothing to do with that. And yet the Government were asked at this stage of a prosecution to which they were no parties to carry the prosecution to an end, and to what end ? The hon. gentleman who had last spoken appeared to urge the Government to undertake the prosecution on behalf of certain persons who had suffered by the failure of Overend, Gurney, & Co. Let it not be supposed that he was one of those who had not suffered. Members of his family had been reduced to the brink of ruin by the failure, but those who had so suffered would not add a feather's weight to the humiliation and degradation and suffering which had attended the members of that firm. He was not acquainted with all its members, but he knew the Overends ; he called them friends in the hour of their prosperity, and he should be ashamed if he hesitated to call them friends in the day of their adversity. Within the last few days he had seen two of the persons whose conduct had been impugned ; and he knew that they were desirous that the trial should proceed. He knew that they were confident that they could vindicate themselves. Well, then, let the trial be carried on by those who had conducted it hitherto. If they could not have carried on, they should not have instituted it, and he most respectfully protested against the power of the State being employed in a particular action. He recollected it had been so employed on a former occasion, in which it was his opinion that, after an expenditure of £38,000, they got hold of the wrong man."

A very able member of the bar, and an accomplished lawyer (Mr Staveley Hill), added his voice in support of the same view. He said—

"He wished to add to the authority of the right hon. gentleman the

Home Secretary any little weight his testimony could give. It never had been the practice of Government to take up a proceeding of this sort at the stage at which it had now arrived. Whenever a prosecutor intended to call in the assistance of the Government, it was usual to do so before going before the committing magistrate. When a private prosecutor had gone on to the eleventh hour, it was too late to call on the Government to take up the case."

The head of the profession, the Attorney-General (Sir R. P. Collier), supported the same view. He said—

"In the first place, it should be borne in mind that there were two distinct questions raised in this discussion; one was the general question of the appointment of a public prosecutor, and the other the conduct of the Government with regard to this prosecution. As to the appointment of a public prosecutor, he had once or twice before expressed a strong opinion that such a public functionary was desirable, and he had seen no reason to change that opinion. But it must be remembered that we had no public prosecutor in this country. The Government was not a public prosecutor, the Attorney-General was not. It was only in rare and exceptional cases that the Government had conducted prosecutions; and here he would observe that the application now made to the Government was entirely unprecedented. No Government had ever subsidised a prosecution. For a prosecutor to go to the Government and say, 'Give me so much money, but you shall have no control over the prosecution,' was entirely without precedent. Then came the question whether the Government themselves ought to have undertaken the prosecution. The principles upon which the Government proceeded were these—first, they had reference to the public importance of the prosecution, and, secondly, to the probability of a conviction. In order to enable the Crown to determine whether they would prosecute or not, it was absolutely necessary that they should have the evidence before them; and, therefore, if Dr Thom and those who were conducting the prosecution had wished the Government to take up the case, they should have furnished the law officers of the Crown with all the information which they possessed respecting the case, before the matter came before the Lord Mayor, or else have sent the depositions afterwards. Neither of those courses had, however, been adopted, and the result was, that the law officers of the Crown were totally without information to enable them to judge whether it would be desirable for them to undertake the prosecution or not. It was impossible for the Crown to go into court to-morrow morning, knowing nothing of the case, and say that the prosecution was now going to be conducted by the Government. Therefore, under these circumstances, however much hon. members might regret the absence of a public prosecutor, they must feel it was impossible for the Government to have pursued any other course than the one they had adopted in the matter."

No one, it might have been supposed, would fail to see

the justice of these observations. And it is astonishing that so able a member as Sir J. Pakington should have failed to see it, or should have fancied that it could be just or reasonable that a Government should be bound to take up an absurd prosecution instituted in defence of the opinion of one of the judges of the land, and carried on amidst popular clamour and excitement which had confused the public mind. He said—

“This was a most important and extraordinary question, and one which touched the interest and the honour of this great country from one end to the other. The failure of this great house had inflicted ruin and misery throughout the length and breadth of the land. Personally, he was not affected in any degree by the question, and therefore his opinion was free from any taint of partiality; but he was convinced that if this prosecution were to be allowed to drop for want of funds to carry it on, a deep blow would be inflicted upon the laws of this country, and great dissatisfaction would be felt by the public. He hoped nothing so scandalous would occur as a failure of this prosecution from want of funds to carry it on.”

This was language which implied that there was a case for the prosecution, and a case which deserved and required a prosecution; and this was said, notwithstanding the Vice-Chancellor had declared that there was no fraud, and had decided that there was not even a charge of equitable fraud, and this upon a bill which stated all the charges that could be supported by the evidence for the prosecution. Moreover, the case occurred when the right hon. gentleman himself was in office, and his Government did not take up the prosecution.

Of course the friends of the defendants were only anxious for trial. Mr C. Buxton, in remarking upon this peculiarly painful case, said—

“He must express the deep regret which the directors and their friends would feel in the event of this prosecution not being proceeded with. They had been advised not to enter upon their defence before the Lord Mayor, in the belief that they would have an opportunity of setting themselves right with the public on their trial. He was intimately acquainted with the details of the defence; and putting aside the errors of judgment which he was afraid they had fallen into, he could confidently assert that they were as free from all imputation of fraud as any hon. member in that

House. If the defence were to be entered into, it would have an immense effect upon the public mind, and therefore he trusted, in the interests of the directors, that the prosecution might go forward, in order that their honesty might be triumphantly vindicated. If the prosecution were to drop through, it would be by reason of the conduct of the rich shareholders, who were content to express their belief of the guilt of the directors without contributing a penny towards the expenses of the prosecution. During the prosperity of the directors, they were generally respected and beloved, and no persons had so much reason to deplore the ruin of the undertaking as the multitude of those who had participated in their bounty."

A sensible member (Mr Barnett) said—

"Having heard a good deal said on both sides, he had come to the conclusion that the Government could not have taken any other course in this matter than the one they had pursued, and he felt certain that they could not have wisely undertaken this prosecution. In the case of the Western Bank of Scotland, where the ruin was equally great with that resulting from the present case, no prosecution had been undertaken by the Government."

Another member (Mr R. Fowler) said—

"He was acquainted with four of the persons to be prosecuted, and one of them was one of his oldest friends, and he felt sure they never intended to commit fraud on the public, and that the result of the trial would vindicate their character."

This was evidently the general feeling of the House, and in entire accordance with it. The Prime Minister (Mr Gladstone) expressed his opinion thus. The speech has great interest, and perhaps was one of the most important incidents in the history of the case—

"The question was one of very great importance, and he trusted the House would believe that the Government had not acted lightly on it or without strong conviction. The strong and positive assertions of the right hon. gentleman (Sir J. Pakington), he owned, appeared to him to be a little out of place when they remembered what was admitted on all hands—that the proper time for undertaking these affairs on the part of the Government was at the earliest stage of the proceedings, which happened in the present case when the right hon. baronet was a member of the Government. The first difficulty he felt was as to the form of this motion. The hon. gentleman invited the House to interfere with the discretion of the Executive Government in the discharge of their executive functions and in respect to the administration of justice. The House had a right, no doubt, so to interfere, but it was an extreme right, and one which was only to be exercised on the rarest possible occasions. It was, therefore, only reason-

able that the Government should have clearly before it the motion by which it was intended to override their discretion, and that they should also have the power of amending that motion and substituting some other issue for it. But how did the case stand? Notice of motion was given by the hon. member for Windsor, but as the forms of the House prevented it from being put, the hon. member for Brighton had substituted for it a motion for the adjournment of the House, and had announced that he should regard the carrying of that motion as equivalent to a distinct direction to the Government to institute this prosecution. That appeared to him to be a great aggravation of the difficulties of the case, for it was due to the Government, not as individuals, but to the offices they held, that they should enjoy the usual and ordinary freedom of seeking to vary the terms of motions to which they objected. As at present advised, it was not possible for them to take a course which they believed to be opposed to the public interests, and to the clearest dictates of expediency. The precedent of 1857 had been appealed to, but he could not admit the authority of the precedent. It had not been followed up, and he believed that a most questionable conclusion had then been arrived at. He therefore claimed the right of considering this question on its merits. We had no public prosecutor in this country for the general class of frauds, and the general rule which charged the expense of criminal prosecutions on the public funds, did not apply to frauds. If exceptions were to be made to this rule, on what grounds ought they to be based? There was first the moral enormity of the offence of the imputed delinquents. That, however, could not be alleged in the present case without gross inconsistency. Whatever might be said as to the magnitude of the ruin and the amount of the scandal in the present instance, there could be no doubt that there were cases of far greater and darker commercial immorality which had been blazoned to the world without interference on the part of Government. It would not be, therefore, for the vindication of commercial morality that the Government were asked to interfere, while graver forms of guilt were left to pass unquestioned. The next ground upon which he might be called upon to prosecute was the certainty or the probability of a favourable result. It could not be said to be the duty of the public prosecutor to take up every case, but to inquire whether there was a fair probability of proving the justice of his case to the satisfaction of the Court. It was agreed that, if there was to be a public prosecutor, it would be his duty to examine every case *ab initio*, and to make up his mind before he took any steps to commit the Government. The motion of the hon. member for Windsor, which must be read like a palimpsest, under the more recent writing of the hon. member for Brighton, declared that a prosecution should be instituted, and that it should be conducted by the Attorney and the Solicitor-General. That might have been very well if it had been done when the right hon. baronet was a member of the Government. It happened, however, that, the defendants being anxious to secure the advocacy of the Solicitor-General, his hon. and learned friend had for months been engaged on their side. It was not possible for the Government to depart from their judgment in obedience to an undefined wish of the House. When this pleasure of the

House was distinctly declared, they would then take it into their deferential consideration. But what were the Government asked to do? They were asked, without an examination into the probability of a successful issue, to rush into the midst of the fray, and impose upon the State the responsibility of all that had been done, and all that remained to be done. He now came to the third ground, which appeared to him to be one of great plausibility, and that was that the parties who desired the prosecution were poor and destitute of means to vindicate their interests. But was that representation really applicable to the present case? The fourth and great ground alleged was that the interference of the Crown was desirable on account of the magnitude of the case. That meant that the scale of the transactions were enormous, and that the figures were counted by almost tens of millions. So that while a larger portion of the suffering shareholders might be persons of small or moderate means, a large portion also were persons of great and undoubted wealth. That was a consideration of the greatest importance. The hon. member for King's County called on them to interfere on behalf of poor persons who had lost their money; but if they did interfere on behalf of the poor, this was not a case in which they ought to interfere. In a multitude of cases in the private walks of honourable commerce men had been stripped of every farthing they possessed without having the means of obtaining justice; but in the present case there were numerous shareholders able to vindicate their interests, and yet who did not choose to do so, and the Government were called on to depart from their general rule, and take the place of these wealthy persons. He wished, in the most dispassionate manner, to join issue on the question of the moral result. What was wanted by some hon. members was the removal of scandal and disgrace in all cases of the administration of justice. In acting in reference to that matter they looked to the future, and it was their business to deter and repress. How, then, would it act on the future prudence and self-restraint of a generation too greedy of money and too ready to adopt the most doubtful means of making money by placing their investments in concerns of which they know nothing, without choosing to go through the honest toil of industry, if such people were told that, when their humble competitor, who carried on a regular trade, failed, he must take the consequences, but if they failed, the magnitude of the transactions of their concern would attract the attention of Parliament, excite some benevolent member of the House of Commons to make a motion on the subject, and, for their thirst for money, they would receive the exceptional favour of the State by Parliament bearing the expense of carrying their case to trial?"

Notwithstanding some expressions of dissent on the part of one or two members, this speech commanded the general assent of the House; and Mr Muntz fully expressed it when he made these brief concluding observations. He said—

"They were not there to try the directors, but to discuss the resolution of the hon. member for Windsor, whether Government ought to take up this

prosecution and pay a private solicitor to carry it on. He entirely agreed with the Attorney-General that if the Government should have taken up the prosecution, they ought to have done so at the beginning. He was not prejudging the case, but, however had the case might be, it was too late for the Government to undertake the prosecution. He must give credit to the right hon. gentleman the First Lord of the Treasury for the remarks he had made; for it was well known so wealthy was this concern only five years ago, that few hon. members would have declined to take shares when they stood at 12 per cent. premium. Why, he himself had been ridiculed because he would have nothing to do with it. At that very time savings-banks were failing, but who came forward to invoke a prosecution by the Government? This was a limited liability concern; but don't let them find fault with limited liability, but rather with the unlimited fools that took shares in it."

So the discussion dropped; and when the case came on for trial next day, no counsel being prepared to conduct it, the Lord Chief-Justice was asked to put it off until the next Sittings, in order that counsel might be instructed, which he at once assented to do, on an affidavit that it was believed that counsel would be so instructed. And accordingly, at the next Sittings in December 1869, the case came on for trial at Guildhall, and was conducted by counsel. And that trial is now to be reported.

As the evidence was in substance the same as that which had been adduced before the magistrates, and which has already been shown to be wholly insufficient to make out a case, it would appear to follow that the Lord Chief-Justice might safely have directed the jury to acquit the defendants, upon the conclusion of the evidence for the prosecution; and it should seem that such was his own opinion; for, after the verdict of acquittal was pronounced, he not only declared his concurrence in the verdict, but pronounced the prosecution, as regarded the new directors, to have been not only unfounded, but unjustifiable; and, as they knew all that the others knew, it would appear to follow, that as against the others, the prosecution was equally unfounded, though not equally inexcusable. And this also appears to have been the view of the Lord Chief-Justice, who intimated very distinctly that a public prosecutor would probably not have instituted such a prosecution at

all ; and, of course, it would have been hopeless to do so, if the old directors had the benefit of the evidence of the others, which entirely exonerated them. But although it appears to have been the opinion of the Lord Chief-Justice that there was no case against any of the defendants, there were many reasons why he might deem it undesirable to direct an acquittal. In the first place, he was not asked to do so, except as against one of the defendants ; and upon *particular* grounds which were clearly untenable : added to which, it would have been invidious to have stopped the case only as against one, which would have appeared to imply that there was a case as against the others. In the next place, he might fairly have inferred, from the absence of any such application, that the others preferred the verdict of a jury on the merits, rather than an acquittal directed by the judge, which, though equally on the merits, might have appeared to have gone more on the legal merits than the verdict of a jury probably would do. And, further, there is this defect, among many others, in our criminal procedure—that a judge has no legal *power* to direct an acquittal, and, in a legal sense, he can at the utmost only *advise* it. He cannot, as in a civil case, direct a verdict to be entered ; he must take the verdict of a jury ; and the writer has known juries insist upon convicting, not only of misdemeanour, but even of felony, against the express direction of the judge ; and in such cases nothing is left but an appeal to the Crown. There were not wanting symptoms among some of the jury, of the influence of that feeling against the accused, which was the natural result of three years of public clamour against them ; and the Lord Chief-Justice wisely preferred addressing himself to the reason of the jury rather than appear to interfere with their province and function. With what success he so appealed, the result showed—a result as remarkable as any which ever was witnessed in any legal proceeding ; for a verdict of acquittal was obtained, contrary to the whole current of public feeling, as it had ran for

three years. But although the Lord Chief-Justice took that course, it is obvious, not only from the tone of the summing up, but from the tenor of all his observations throughout the case, that he felt that there was no case. Some, indeed, ignorant of the previous history of the case, supposed that he had shown this feeling too strongly. But no one will think so who reflects that these gentlemen had been already absolved, even of equitable fraud, by the highest Equity Judge, and had been already acquitted of any actual or intentional fraud, even by the judge who had taken the most unfavourable view of their case. It was impossible, under such circumstances, that a judge should be able to help feeling that these gentlemen ought not to have been put upon their trial, or should have failed to do his utmost to prevent such a scandal to justice as would have been occasioned by their conviction. Moreover, it should be borne in mind that, although the Lord Chief-Justice was aware of these previous judicial acquittals, he knew that in all probability the jury were *not*. The prosecutor would not put in the Chancery proceedings, on which their acquittal would have appeared, and the defendants could not put them in—as, in law, an acquittal in Chancery is no bar to an indictment,* though,

* It is a suit between particular parties ; whereas, as Lord Tenterden pointed out in a case already cited (at p. 82), a criminal prosecution is at the suit of the Crown ; so that the proceedings would be totally different. It is to be observed that an answer in Chancery, though it might be put in on the part of the prosecution, could not be put in for the defence ; as no one, of course, can put in his own statement. And the prosecutor was desirous of putting in the affidavits made by the defendants, though not their answers, which they desired to have put in, as containing their whole defence. On the other hand, it would have been unfair to allow the affidavits or answers to be put in without the whole of the proceedings, and the Lord Chief-Justice declined to allow it ; consequently no part of the proceedings were put in. It has been seen that in the suit in Chancery, on the part of the shareholders against the directors, the charges made were, that the directors knew the firm to be insolvent, and did not disclose the second deed, and no more was alleged on the present trial ; yet both the Vice-Chancellor and the Lord Chancellor held that those charges did not amount even to equitable fraud, and declared that there was no actual or intentional fraud. And though the Vice-Chancellor held that there was some ground for equitable relief, the Lord Chancellor reversed his decree. It is true the Lord Chancellor said there might or might not be some case of equitable fraud on the part of any particular shareholder ; but this must have meant on some other grounds than those stated, and which were the same as those alleged and proved in the prosecution. It only remains to add, by way of explanation, that though at law fraudulent suppression may be an element in a case of fraud, it is only so when it is part of a positive misrepresentation.

of course, it is morally conclusive ; for if there had been no equitable fraud, there could have been no legal fraud, civil or criminal. This probably was the first time in our legal history that men who had been absolved in Chancery from all imputation of fraud, even in an equitable sense, were put upon their trial for criminal fraud. The verdict of the jury only confirmed an acquittal already pronounced in the highest equitable tribunal of the realm ; and the enthusiasm with which the verdict was received showed that it was in entire accordance with public opinion.

A REPORT
OF THE CASE OF
THE QUEEN *v.* GURNEY AND OTHERS,
BEFORE THE
LORD CHIEF-JUSTICE OF ENGLAND,*
IN THE COURT OF QUEEN'S BENCH, GUILDHALL,
DECEMBER 13, 1869.†

INDICTMENT.—The jurors for our Lady the Queen, upon their oath, present that, before the commission of the offence hereinafter in this count mentioned, certain persons—Henry Edmund Gurney, Samuel Gurney, David Ward Chapman, and Robert Birkbeck—carried on the business of bill-brokers and money-dealers at No. 65 Lombard Street, in the city of London, under the style or firm of Overend, Gurney, & Co., and at the time of the commission of the offence hereinafter mentioned, were unable to pay their creditors and to meet their debts, liabilities, and engagements, and which said firm of Overend, Gurney, & Co. is hereinafter named and referred to in the prospectus, and false statement herein-

* Sir Alexander Cockburn.

† The trial lasted nine days, from the 13th to the 23d December.

after set forth. And the jurors aforesaid, upon their oath aforesaid, do further present that at the time of the commission of the offence hereinafter in this count mentioned, the said Henry Edmund Gurney, Henry Ford Barclay, John Henry Gurney, the said Robert Birkbeck, Harry George Gordon, and William Rennie, were directors of a certain public company—to wit, of a company called Overend, Gurney, & Co. (Limited). And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Henry George Gordon, and William Rennie, being such directors of the said public company, and whilst they were such directors, and well knowing the premises in this count mentioned, on the 12th day of July 1865, within the jurisdiction of the said Central Criminal Court, unlawfully and with intent to induce and persuade divers of the liege subjects of our said Lady the Queen to the jurors aforesaid unknown, not then ascertained by them—to wit, all such of the said liege subjects as should be induced so to do by a belief in the truth of a statement and account next hereinafter mentioned—to become and be shareholders in the said public company, did make, circulate, and publish a certain false written statement, purporting to be a prospectus of the said company called Overend, Gurney, & Co. (Limited), of and relating to the affairs of the said company, and which said written statement then and there was and is in the words and figures following; that is to say—"Capital, £5,000,000 in 100,000 shares of £50 each, of which it is not intended to call up more than £15 per share. Deposit on application, £2 per share; £5 per share on allotment; £4 per share on the 15th September, and the same on the 15th November.

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs Overend, Gurney, & Co. of their long established business as bill-brokers and money-dealers, and

of the premises in which the business is conducted; the consideration for the good-will being £500,000, one-half being paid in cash, and the remainder in shares of the company, with £15 per share credited thereon: terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders. The business will be handed over to the new company on the 1st August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

“Three of the members of the present firm have consented to join the Board of the new company, in which they will also retain a large pecuniary interest. Two of them—Mr Henry Edmund Gurney and Mr Robert Birkbeck—will also occupy the position of managing directors, and undertake the general conduct of the business. The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the Board of Directors, who also propose to retain the valuable services of the existing staff of the present establishment. The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company, and the permanent interests of the shareholders. Copies of the company's memorandum and articles of association, as well as of the deed of covenant, in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company.”

And which said written statement then and there was false in certain material particulars, as they the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, when they so made, circulated, and published the same as aforesaid, well knew—that is to say, in the material particulars following, namely:

It was therein falsely stated that it was not intended

—meaning that the said directors of the said Overend, Gurney, & Co. (Limited) did not intend—to call up more than £15 per share upon the shares of the said company called Overend, Gurney, & Co. (Limited).

That the consideration for the good-will of the said firm of Overend, Gurney, & Co. being £500,000, one-half being paid in cash, and the remainder in shares of the said Overend, Gurney, & Co. (Limited), with £15 per share credited thereon, were terms which, in the opinion of the said directors, could not fail to insure a highly remunerative return to the said shareholders in the said Overend, Gurney, & Co. (Limited).

That the business of the said firm of Overend, Gurney, & Co. would be handed over to the new company—meaning the said Overend, Gurney, & Co. (Limited)—on the 1st day of August then next, the vendors—that is to say, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck—guaranteeing the said company of Overend, Gurney, & Co. (Limited) against any loss on the assets and liabilities transferred.

That the said Henry Edmund Gurney and Robert Birkbeck would also retain a large pecuniary interest in the said company of Overend, Gurney, & Co. (Limited).

That copies of the said last-mentioned company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, could be inspected at the offices of the solicitors of the said company; whereas, in truth and in fact, it was not true that it was not intended to call up more than £15 per share upon the shares of the said company called Overend, Gurney, & Co. (Limited), for, in truth and in fact, the said call of £15 per share upon the shares of the said company was not then sufficient to pay the then existing liabilities of the said company called Overend, Gurney, & Co., which then amounted to the sum of £3,000,000, over and above their assets.

And whereas, in truth and in fact, the consideration for the good-will of the said firm of Overend, Gurney, & Co, being £500,000, one-half being paid in cash, and the remainder in shares of the said company, with £15 per share credited thereon, were not terms which could insure a highly remunerative return to the shareholders, for, in truth and in fact, the payment by the said shareholders of £250,000 to the members of the said firm of Overend, Gurney, & Co., and the issue of the said shares, with £15 per share credited thereon, would have been a payment to them without any valuable consideration, and would have been unremunerative to the said shareholders by reason of the want of such consideration.

And whereas, in truth and in fact, the said vendors—to wit, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck—could not guarantee the said company of Overend, Gurney, & Co. (Limited) against any loss on the assets and liabilities transferred by the said vendors, for, in truth and in fact, there had been and then was an existing loss on the said assets and liabilities of the said vendors to an amount exceeding £3,000,000.

And whereas, in truth and in fact, the said Henry Edmund Gurney and Robert Birkbeck had not then any pecuniary interest to retain, and could not and did not retain any such interest in the said company of Overend, Gurney, & Co. (Limited), but, on the contrary, thereof had incurred, as partners in the said firm of Overend, Gurney, & Co., large liabilities, and were then indebted in large sums of money to the said company of Overend, Gurney, & Co. (Limited)—to wit, to the amount of £3,000,000.

And whereas, in truth and in fact, the deed of covenant mentioned and referred to in the said prospectus, and tendered for the inspection of intended shareholders in the said company of Overend, Gurney, & Co. (Limited), was not the only deed of covenant which had been prepared; and,

in fact, another deed of covenant and arrangement, bearing even date therewith, was then prepared, containing other covenants and stipulations than those contained in the said deed of covenant referred to in the said prospectus, and containing covenants and stipulations adverse to the interests of the said intended shareholders in the said Overend, Gurney, & Co. (Limited), as they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, then and there well knew, against the form of the statute in such case made and provided,* and against the peace of our said Lady the Queen, her crown, and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that, before the commission of the offence hereinafter in this count mentioned, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, carried on the business of bill-brokers and money-dealers, at No. 65 Lombard Street, in the city of London, under the style or firm of Overend, Gurney, & Co., and before and at the time of the commission of the said offence, had contracted and agreed with the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, for the sale of the said business, and for the formation of a company, to be called Overend, Gurney, & Co. (Limited), they, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, then, at the time they so contracted and agreed, as aforesaid, being unable to pay their creditors, and to meet their debts, liabilities, and

* The statute here referred to, and on which this and the five following counts were framed, is the 24 & 25 Vict. cap. 96, s. 84: Whosoever, being a director, manager, or public officer of any body corporate, or public company, shall make, circulate, or publish, or concur in making any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body or company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body, or to enter into any security for its benefit, shall be guilty of a misdemeanour. The following five counts merely varied the charge upon these several intents.

engagements ; and which said firm of Overend, Gurney, & Co. is named and referred to in the false statement and prospectus hereinbefore in the first count of this indictment set forth, and hereinafter in this count referred to. And that at the time of the commission of the offence, hereinafter in this count mentioned, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, were directors of a certain public company—to wit, of a company called Overend, Gurney, & Co. (Limited). And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, being such directors of the said public company, and whilst they were such directors, and well knowing the premises in this count, mentioned on the 12th day of July in the year aforesaid, within the jurisdiction of the said Central Criminal Court, unlawfully, and with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., ignorant of the real pecuniary condition of the said firm, and ignorant of the real pecuniary condition of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to intrust the moneys and property of the said several persons to the said public company, unlawfully did make, circulate, and publish a certain false written statement, purporting to be a prospectus of the said public company, and to be a statement of and relating to the affairs of the said company—to wit, the written statement mentioned and set forth in the first count of this indictment—and which said written statement then and there was false in certain material particulars, as they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William

Rennie, when they so made, circulated, and published the same, as aforesaid, well knew—that is to say, in the material particulars following.* Whereas, in truth and in fact, it was not true that it was not intended to call up more than £15 per share upon the shares of the said company called Overend, Gurney, & Co. (Limited), &c. (as before).

Third Count.—Same as the second, except in stating the intent thus:—Unlawfully and with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm, and of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to advance the moneys and property of the said several persons to the said public company.

Fourth Count.—Same as before, only stating the intent thus:—Unlawfully and with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm and of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to become and be shareholders in the said public company.

Fifth Count.—Same as before, except in stating the intent thus:—Unlawfully and with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm and of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to intrust

* Setting out the same particulars as before.

the moneys and property of the said several persons to the said public company.

Sixth Count.—Same as before, except in stating the intent thus :—Unlawfully and with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm and of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to advance the moneys and property of the said several persons to the said public company.

*Seventh Count.**—And the jurors aforesaid, upon their oath aforesaid, do further present that, before the commission of the offence hereinafter in this count mentioned, certain persons—to wit, Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck—carried on the business of bill-brokers and money-dealers, at No. 65 Lombard Street, in the city of London, under the style or firm of Overend, Gurney, & Co., and, at the time of the commission of the offence hereinafter mentioned, were unable to pay their creditors, and to meet their debts, liabilities, and engagements; and which said firm of Overend, Gurney, & Co. is hereinafter named and referred to in the prospectus of the public company called Overend, Gurney, & Co. (Limited), hereinafter set forth. And the jurors aforesaid, upon their oath aforesaid, do further present that, at the time of the commission of the offence hereinafter in this count mentioned, Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, had contracted and agreed with the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, for the purchase of the said business of Overend, Gurney, & Co., and for the transfer of all the

* This and the following counts were for conspiracy.

assets and liabilities of the last-mentioned firm to a public company to be called Overend, Gurney, & Co. (Limited), of which last-mentioned company they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, were to be directors. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, William Rennie, and divers other persons, whose names to the jurors aforesaid are unknown, well knowing the premises, on the 1st day of July, in the year of our Lord 1865, within the jurisdiction of the Central Criminal Court, unlawfully and wickedly, and with intent to deceive and defraud, did conspire, combine, confederate, and agree together to make, circulate, and publish a certain false written statement of and relating to the affairs of a certain public company—to wit, the said company called Overend, Gurney, & Co. (Limited), with intent to induce and persuade divers of the liege subjects of our said Lady the Queen, to the jurors aforesaid unknown, and not then ascertained by them, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie—to wit, all such of the liege subjects as should be induced so to do, by a belief in the truth of the said statement and account—to become and be shareholders in the said public company. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, did make, circulate, and publish a certain false written statement, purporting to be a prospectus of the said public company called Overend, Gurney, & Co. (Limited), of and relating to the affairs of the said company, and which said

written statement then and there was and is as follows—that is to say (setting it out as before); and which said written statement then and there was false in certain material particulars, as they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie then and there well knew—that is to say, in the material particulars following; that is to say, &c. (as before).

Eighth Count.—Same as before, except in stating the intent:—Unlawfully and wickedly, and with intent to deceive and defraud, did conspire, combine, confederate, and agree together to make, circulate, and publish a certain false written statement of and belonging to the affairs of a certain public company—to wit, the said company called Overend, Gurney, & Co. (Limited)—with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm, and of the said public company called Overend, Gurney, & Co. (Limited), and all such other persons as could be induced so to do by the false statement next hereinafter mentioned—to intrust the moneys and property of the said several persons to the said public company.

Ninth Count.—Same as before, except in stating the intent:—Unlawfully and wickedly, and with intent to deceive and defraud, did conspire, combine, confederate, and agree together to make, circulate, and publish a certain false written statement of and relating to the affairs of a certain public company—to wit, the said company called Overend, Gurney, & Co. (Limited)—with intent to induce divers persons—to wit, persons being customers of the said firm of Overend, Gurney, & Co., and ignorant of the real pecuniary condition of the said firm, and of the said public company called Overend,

said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, could prevail by the false statements aforesaid, so to do to become shareholders in the said public company, and to intrust the property of the said persons to the said public company, against the peace of our said Lady the Queen, her crown, and dignity.

Eighteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, afterwards—to wit, on the said 12th day of July in the year aforesaid, within the jurisdiction of the said court, together with divers other evil-disposed persons—unlawfully did conspire, combine, confederate, and agree, by divers false pretences, and by divers artful and subtle means, stratagems, and devices, to obtain and acquire to themselves of and from one Adam Thom divers of the moneys of the said Adam Thom to a large amount—to wit, to the amount of £900—and to cheat and defraud him of the same, against the peace of our Lady the Queen, her crown, and dignity.

Nineteenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, afterwards—to wit, on the said 12th day of July in the year aforesaid, and within the jurisdiction of the said court—unlawfully did conspire, combine, confederate, and agree, with divers other evil-disposed persons (whose names to the jurors aforesaid are unknown), by divers artful and subtle means, stratagems, and devices, to obtain and acquire to themselves of and from one Adam Thom divers of the moneys of the said Adam Thom to a large amount—to wit, to the amount of £900—and to cheat and defraud him of

the same, against the peace of our said Lady the Queen, her crown, and dignity.

Twentieth Count.—Same as eighteenth, substituting
“Thomas Clark, of £600.”

Twenty-first Count.—Same as nineteenth, substituting
“Thomas Clark, of £600.”

Twenty-second Count.—Same as eighteenth, substituting
“Charles Beard, of £1800.”

Twenty-third Count.—Same as nineteenth, substituting
“Charles Beard, of £1800.”

Twenty-fourth Count.—Same as eighteenth, substituting
“William Peek, of £30,000.”

Twenty-fifth Count.—Same as nineteenth, substituting
“William Peek, of £30,000.”

Twenty-sixth Count.—Same as eighteenth, substituting
“Richard Bridgman Barrow, of £3000.”

Twenty-seventh Count.—Same as nineteenth, substituting
“Richard Bridgman Barrow, of £3000.”

Twenty-eighth Count.—Same as eighteenth, substituting
“John Holme, of £1800.”

Twenty-ninth Count.—Same as nineteenth, substituting
“John Holme, of £1800.”

Thirtieth Count.—Same as eighteenth, substituting
“Edward N. O'Reilly, of £900.”

Thirty-first Count.—Same as nineteenth, substituting
“Edward N. O'Reilly, of £900.”

Thirty-second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, at the time of the commission of the offence hereinafter mentioned, were directors of a certain public company—to wit, a company called and known as Overend, Gurney, & Co. (Limited)—and had before then contracted and agreed to purchase of and from one Samuel Gurney and others a certain business carried on by the said Samuel

Gurney and others as bill-brokers and money-dealers, and which said business, at the time of the said contract and agreement, was of no value; and the said Samuel Gurney and others then were unable to pay their debts, liabilities, and engagements in respect to such business. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, contriving and intending to make it appear to all such persons as should be willing to purchase shares in the said public company, that the pecuniary affairs of the said company were in a prosperous condition, and that the said business so carried on by the said Samuel Gurney and others was a solvent and prosperous business, and intended to deceive, prejudice, and defraud such persons as should become shareholders in the said public company, on the said 12th day of July in the year aforesaid, unlawfully and wickedly did conspire, combine, confederate, and agree together to make, publish, and circulate a certain false statement of and concerning the said business so carried on by the said Samuel Gurney and others, and of and concerning the pecuniary position and affairs of the said public company. And unlawfully, knowingly, and with intent to deceive, injure, impoverish, and aggrieve such persons as should be willing to become purchasers of the shares in the said public company, falsely to pretend to the said persons that it was not necessary to call up more than £15 upon each of the said shares: That the pecuniary affairs of the said business so carried on by the said Samuel Gurney and others then were in a prosperous condition: That the said business of the said Samuel Gurney and others was then of the value of £500,000, and that three of the members of the said firm of Samuel Gurney and others had consented to join the Board of the said public company, in which they would also retain a large pecuniary interest. And the jurors aforesaid, upon

their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, in pursuance of the said unlawful conspiracy, combination, confederacy, and agreement, did, by the said false statement, and false pretences, cause and induce one Adam Thom to purchase divers, to wit, 60 shares in the said public company, and one Thomas Clark to purchase divers, to wit, 40 shares in the said public company, and one Charles Beard to purchase divers, to wit, 120 shares in the said public company, and one William Peek to purchase divers, to wit, 2000 shares in the said public company, and one Richard Bridgman Barrow to purchase divers, to wit, 200 shares in the said public company, and one John Holme to purchase divers, to wit, 120 shares in the said public company, and one Edward N. O'Reilly to purchase divers, to wit, 60 shares in the said public company, with intent to injure, impoverish, deceive, and aggrrieve the said Adam Thom, Thomas Clark, Charles Beard, William Peek, Richard Bridgman Barrow, John Holme, and Edward N. O'Reilly, respectively: Whereas, in truth and in fact, it was then necessary to call up more than £15 upon each of the said shares, for, in truth and in fact, the said public company was then indebted to divers persons to a large amount—to wit, to the amount of £3,000,000 over and above their assets: And whereas, in truth and in fact, the pecuniary affairs of the said business so carried on by the said Samuel Gurney and others were not then in a prosperous condition, but, on the contrary thereof, were in an insolvent state: And whereas, in truth and in fact, the said business of the said Samuel Gurney and others was not then of the value of £500,000, nor was the same of any value, but, on the contrary thereof, was involved in debt to an amount greatly exceeding the assets thereof: And whereas, in truth and in fact, the said three members of the said firm of Samuel

Gurney and others had not a large pecuniary interest to retain in the said public company, and, on the contrary thereof, were then largely indebted to the same.

The defendants pleaded not guilty.

Mr KENEALY and Mr MACRAE MOIR conducted the case for the prosecution.

Sir JOHN COLERIDGE, S.G., Mr HAWKINS, Mr SERJEANT BALLANTINE, and Mr J. C. MATHEW were for the defendants Messrs Gurney and Birkbeck.

Sir JOHN KARSLAKE and Mr LEDGARD were for the defendant Mr Gordon.

Mr MELLISH, Mr SERJEANT PARRY, and Mr M. WILLIAMS were for the defendant Mr Barclay.

Mr GIFFARD and Mr B. GARDYN were for the defendant Mr Rennie.

Mr Kenealy, in opening the case, stated that the first six counts contained a charge of conspiracy to induce persons to become shareholders in a certain company by publishing and circulating a false prospectus. There were other counts for conspiracy to obtain money, and generally, for conspiracy to cheat and defraud. He likened the case to that of the South Sea scheme, and said the defendants were charged with having conspired together to rob the public of £3,000,000. The case for the prosecution, as he opened it, appeared to resolve itself into this: That the transfer had been entered into when the vendors, the members of the old firm, were known to be in a state of insolvency, so that it was in contemplation of bankruptcy. He opened no misstatements on the prospectus, but dwelt almost entirely on the alleged insolvency of the firm, and on a combination to dispose of the business, knowing of the insol-

veney.* He cited the law on conspiracy, as laid down by Lord Ellenborough in the case of *De Berenger*,† who was charged, with Lord Cochrane and others, with endeavouring to raise the price of stock by false rumours. He said—

“The offence of conspiracy, gentlemen, is an offence consisting in the wicked concert, contrivance, and combination of individuals to effect some public or private injury or mischief; that contrivance and that combination is not to be collected, nor is it practicable in the course of human affairs to collect it, from the mouths of the parties assembled for the purpose of communication, but from the actings and conduct of the several parties as they may appear generally to conspire and conduce to the same wicked end and purpose; and if it appears to you, from the actings and conduct of these parties, that they entertained the same common purpose of mischief, and that they have, by their several actings, combined and co-operated to the effecting that same wicked purpose, that is sufficient to bring home the imputation of the crime charged against the parties; therefore the prosecutors need not show that they have met in common counsel, or even that they have seen one another before, if their acting shows they were influenced by one common purpose of mischief, and aimed at the production of the same malignant end and effect. Suppose persons jointly charged in an indictment with the breaking of a house are found on different sides of the same house, besetting and endeavouring to enter it at the same time, you need not show that they had actually met and previously contrived the plan of this joint robbery. The unity of their conduct proves their joint contrivance and concert to accomplish the same end, though, indeed, this is a case where personal presence at the acts done renders all intendment of the personal concert of the actors unnecessary. The same rules which apply to the offence of conspiracy as a mis-

* As to this, *vide ante*, p. 6. Assuming the alleged insolvency, yet if the business was profitable, and worth the purchase-money, *quære* whether there was any case? The assets were immaterial, except as to the security or sufficiency of any guarantee of their value (for it was a sale of business, not of assets), and that would be matter of contract, precluding any question of fraud, except fraud in inducing parties to enter into it. But no fraud was imputed, except in not disclosing an alleged insolvency, the real facts being known to all the *décreteurs*. But if solvency of the vendors were material, it would be solvency including all their assets, private as well as partnership. Yet the case was pointed mainly at a supposed insolvency of the firm, arising out of a deficiency of partnership assets. Altogether, it was extremely obscure what the case for the prosecution really was, but it is believed that the above is a correct statement of its effect.

† *Rex v. De Berenger*, 8 M. & S. No one disputed the above. But it has always been held that there must be unlawful means used in any conspiracy, and, in a conspiracy to cheat and defraud, some fraudulent means (*Rex v. Steward*, 1 Adolphus & Ellis Reports, 706). And, as already shown, fraudulent means would imply at law some false representation, wilfully false, and intended to deceive. And though suppression might be an element in fraudulent representation, it would only be so if fraudulent. But no one had ever supposed it was fraudulent for a vendor or guarantor not to disclose the state of his circumstances—at all events, unless, on the whole of his assets, in his own estimate, he knew insolvency inevitable (*Belcher v. Prittle*, 10 Bing.)

demeanour would apply equally to all crimes committed by a concert up to the crime of high treason, which is often established by evidence of the distinct actings of separate parties, breathing the same purpose, and immediately conducting to the same end. The question, therefore, for you to consider upon the evidence will be whether the case is not brought home by satisfactory evidence to a great number, if not to all, of the defendants."

It was not necessary, therefore, to prove that the defendants were ever actually together. Nor was it to be said that, since these persons had not aimed at any pecuniary result by the conspiracy, the prosecution could not be sustained; but he might dispose of this by another portion of Lord Ellenborough's summing-up, which was to the following effect—

"The crime charged upon this indictment, in eight different charges or counts, is that of conspiring to raise the price of the public funds; in some of them it is charged to be with a view to corrupt gain upon the part of these persons, or some of them, or at least to the prejudice of other individuals, for that is enough to constitute the offence, even if the individuals engaged in the conspiracy had not (as it is imputed to them that they had) any corrupt motive of personal advantage to all or any of themselves to answer; if the criminal artifice operated, or was, in all probability, likely to operate to the prejudice of the public, and was clearly so intended, we need not go further."

It was thus the intention, and not the result, which was to be looked at. The defendants were connected with the old firm of Overend, Gurney, & Co., which was established towards the close of the last century, and obtained a world-wide reputation. It was conducted with great prudence and honour by the ancestors of the defendants, and eventually became one of the largest monetary establishments in the world, the extent of their profits being latterly, before they parted with it, something like £125,000 a year. When, however, the present defendants entered upon the management, an entirely different policy was apparently adopted; they plunged into speculation, and it would be proved that, during the five or six years preceding their attempt to involve others in the same ruin as themselves, they had been losing at the rate of £500,000 a year. Not content with being mere money-dealers or bill-discounters, they became partners in various undertakings, and made

large advances upon securities of ships or shares. The total amount of these accounts was £4,000,051, 15s. 11d., which was entered in the books and treated as cash. Moreover, not satisfied with defrauding them of the large amount represented by this £4,000,051, the new company actually advanced to these parties £615,000 more, in order, if possible, to keep up these rotten speculations, in which the defendants had a pecuniary interest, so that the whole sum was very nearly £5,000,000.

The Lord Chief-Justice.—In what way was this list of debts brought to the knowledge of those to whom it was proposed to become shareholders?

Mr Kenealy said they formed part of the alleged assets, which were *not particularised in the prospectus*, but appeared in the books.

Sir J. Karlake.—Yes, *but they are the excepted accounts*.

The Lord Chief-Justice understood the allegation of the prosecution to be that these sums were reckoned as probable assets, but were, in fact, worthless. He wanted to see how far this was brought to *the knowledge of intending shareholders*, so that *it might operate as an inducement*. Where were *those sums represented as good debts*?

Mr Kenealy replied that the public were given to understand that the assets amounted to £15,000,000. Now, of that sum £4,000,000 was made up of these worthless debts. The position of the defendants in the spring of 1865, he said, was this—the greater part of the £5,000,000 intrusted to them on deposit was payable at call within seven days,* and figures taken from their own books showed that their liabilities amounted to £15,207,000,† while their real assets under the most favourable view were only £12,075,000, so that there was a clear deficiency of £3,132,000.‡ Their

* But, in the ordinary course of business, renewed or replaced by fresh deposits.

† Seven millions of which were *deposits* (nearly two millions secured), and another million was due to the partners themselves; the debts actually due and payable were only seven or eight millions, and these mostly secured.

‡ That is, a deficiency of ready assets, or assets immediately convertible. According to the estimates, there was no deficiency, in value and amount, of good assets, including the private estates.

commercial ruin, under such circumstances, could only be a question of days, the only available cash in the till being £120,000. At the end of seven days, calls *might* be made by their depositors, which must end in their irretrievable ruin. This situation must have pressed very much on their minds. They could not fail to be sensible of the ancient glory of their house, and to be animated by a strong desire to sustain it if possible. Probably they shrank from the ordeal of convening their creditors, though this was the only honourable course open to them. Had they done so, and distributed among their creditors whatever remained over the vast sums lost by their speculations, it had been computed that there would not have been more than 6d. or 1s. in the pound. They probably shrank from so disgraceful a conclusion. They combined to defraud honest and innocent persons of the £3,000,000 and upwards which had been lost by their reckless speculations. They conspired to throw the burden on the shoulders of those they induced to become shareholders, in order to save themselves, for a short time, from the destruction which threatened them, trusting, probably, to the chapter of accidents, but determined, at all events, by falsehood and false pretences, to cover the losses which they had sustained. There were £4,000,000 of assets, of which not above £1,000,000 was even estimated to be good; the rest were worthless. The defence would probably be that the £4,000,000 was never transferred; but the fact was, that by the first deed all the assets were transferred, and that the defendants then transferred certain assets back to themselves by the second and secret deed.

The Lord Chief-Justice observed that the £4,000,000, which may have turned out worthless, was *not held out to the public as available assets belonging to the company*, but was included in a distinct deed and distinct account as remaining still in the old firm.

Mr Kenealy.—We say it was a fraud, it being transferred to the new company as part of the £15,000,000

assets. He maintained that the transaction was carried out in contemplation of the insolvent state of the defendants. He did not enter into further particulars of the alleged fraud; he opened no other evidence to show specific statements in the prospectus to be false; and his case appeared to rest upon the allegation that the transaction was entered into in a state of hopeless insolvency, and on the faith of a guarantee of assets transferred as cash, which were worthless.

In setting forth the evidence for the prosecution, it may be convenient to arrange it under different heads, in the order in which the matter arose in the course and history of the case: first, as to the nature and extent of the business, and the condition of the affairs of the firm up to and at the time of the transfer; next, as to the circumstances and terms of the transfer, and especially as to the deeds and the prospectus; and lastly, as to the history and career of the new company, and the causes of its failure.*

First, as to the nature and extent of the business before and at the time of the transfer, and the condition of the affairs of the firm at that time.

The principal evidence under this head, of that of the official liquidators—Messrs Harding and Turquand—who stated that, in the course of the liquidation, they had the books of the firm before them, and had seen nothing in them to affect their confidence in them. There were materials, for any one acquainted with the business,† to arrive at a proper result; and from their acquaintance with the business thus derived, Mr Harding stated that the business, as a money-dealing and bill-broking business, was very large and lucrative. Large sums of money, he explained, went into the concern to be paid out, and came back again—that is, to be “turned over.” The amount of

* It has been considered convenient, also, according to the usual practice of law reporters, to state clearly the facts proved, in evidence, rather than to set forth the evidence *in extenso*, which would tend not only to inconvenient length, but also to confuse and obscure the case.

† It will be observed what importance they attached to a knowledge of the business—*i.e.*, of its nature. The neglect of this led to all the unfortunate fallacies of the prosecution, and the persuasion of its importance led the reporter to preface the case by an explanation of it.

money "turned over," therefore, showed in effect the transactions of the business.

From the year 1859 to the year 1866—i.e., the amount of money "turned over" in the house was £1,115,876,000. Taking the amount year after year it was as follows:*

1859	...	£156,000,000	1862	...	£157,000,000
1860	...	171,000,000	1863	...	177,000,000
1861	...	138,500,000	1864	...	198,000,000
1865 up to July 31	...	...	...	...	77,300,000
1865 (July) to 1866 (May 10)	...	...	...	...	66,000,000

The amount of bills discounted during the same period was—

1859	...	£62,000,000	1862	...	£64,300,000
1860	...	62,000,000	1863	...	66,300,000
1861	...	53,600,000	1864	...	74,980,000
1865 to July 31	...	...	...	...	41,338,000
1865 (Aug. 1) to 1866 (May 10)	...	...	...	...	56,000,000

Being asked the earning power of the business, he said, *I know of no other business so large.* He believed that £180,000 or £190,000 a year would not be an exaggerated estimate of the annual amount of profit.

In 1861, he said, the profit appeared to have been £261,670; in 1862, £189,700. He found that the legitimate business of the company—that is, the money-dealing and bill-broking business—remained, practically speaking, much the same as that of the old firm; there was a large amount of very good paper turned over.

The official liquidator made the following statement as to the business and profits for ten years prior to 1859—i.e., from 1852 to 1860—

		Profit.		Amount divided.		Carried to reserve.
1851	...	£136,700	...	£120,000	...	£37,400
1852	...	186,380	...	180,000	...	600,000
†1853	...	212,900	...	...	...	...
1854	...	1,530,000	...	80,000	...	73,500
1855	...	155,250	...	132,000	...	23,250
1856	...	148,600	...	140,000	...	8600
†1857	...	144,460	...	...	...	...
1858	...	293,000	...	240,000	...	53,600
1859	...	442,000	...	360,000	...	82,000
1860	...	343,000	...	216,000	...	127,300

* Round numbers are given.

† None divided—all written off on account of bad debts.

‡ All carried to reserve.

That, he stated, gave an average of profits of £220,000, and an average division of profits of £146,000.

He further stated that, in 1861, the profit was £261,670; in 1862, £167,200; in 1863, £70,800; and in 1864, £72,000. The total amount earned in 1861-1864 was £600,000, and deducting £480,000, written off for bad debts, thus left £116,000. And for the first five months of 1865, the net earnings were £32,901.

Next, as to the condition of the affairs of the firm at the time of the transfer. The evidence as to this consisted of the books of account, and of the testimony of three accountants—two of them the official assignees, and the third an accountant appointed by some of the shareholders. The latter was most relied on by the prosecution, but was found, so far as regarded what was legally relevant, not materially to differ from that of the official liquidators.

The principal book put in was the ledger of the firm, in which, at the date of the transfer, 31st July 1865, the accounts stood thus, discarding fractional sums for the sake of distinctness. In gross totals the firm were debited with the sum of £15,000,000. And the assets on the other side, to the same amount, included about £4,000,000 of bad and doubtful debts, of which, according to the evidence, about a million was estimated to be good, leaving an apparent deficiency of £3,000,000. But among the items on the debit side of the account was a sum of a million due to the partners on their balances of their private accounts, which being struck off, the debts would be reduced to £14,000,000, and of course the apparent deficiency would be reduced to £2,000,000. Moreover, of the debts, about £7,000,000 were composed of deposits at interest; about £2,000,000 from country bankers (secured); and £5,000,000 from private depositors, withdrawable at several days' notice. Deducting this sum of £7,000,000 from the amount of debts, there would remain £7,000,000 of debts. On the credit side, besides the £4,000,000 of doubtful

assets, there were above £1,500,000 in actual cash and bills (£120,000 of it being actual cash in the till, the remainder short bills), and £8,500,000 cash securities, with upwards of a million cash advances.

Thus therefore treating the whole of the deposits as being instantly due and payable, there would be of the assets of the firm (not including those of private estates) an apparent deficiency of £2,000,000. But if the deposits were regarded, not as debts payable, but rather as floating capital, liable to future withdrawal, there would be no actual deficiency; and supposing the private estates to be equal in value to the £2,000,000, there would not be even a contingent deficiency. And no evidence was given to show that the actual withdrawals exceeded the amounts of deposits until the occasion of a panic, several months afterwards. The accountants, however, treated all debts in account as equally debts, and debts presently payable, and thus they arrived at a conclusion that the firm was insolvent, although, as will be seen, the official liquidator stated, taking the private estates of the partners into calculation, the deficiency would be apparently covered.

It is material to observe that in the accounts where actual cash was meant, it was entered and described simply as cash, and so the sum of £120,000 was entered. But all the items were entered "cash;" thus "Cash—bills," "Cash—advances." An account at the time of the transfer was opened in the books of the old firm to the new company, and the company was debited with assets and credited with liabilities of the firm. And of the £15,000,000 of assets about £4,000,000 were debited to the "suspense" and "guarantee account."

The shareholders' accountant stated, that, in his view, taking all the items of the account on either side, the one as representing assets, the other as representing liabilities, and taking all the debts as present liabilities, including the deposits, the assets would not amount to more than £10,000,000, leaving out the £4,000,000 of doubtful assets,

of which the value was estimated at £1,000,000. But this was reckoning all the deposits as present debts, and also leaving out the £1,000,000 due to the partners themselves. He admitted the right to deduct for the latter item, and making those deductions, the deficiency, as already stated, on the assets of the firm, came to £2,000,000.

The case for the prosecution, upon this part of the case, was mainly based on the evidence of the shareholders' accountant, who thought that a sum of above £7,000,000 ought to be added to the liabilities of the firm, in respect of bills re-discounted by them and dishonoured, which he considered exceptional. As to these he was asked, on the part of the prosecution, whether he considered them exceptional.

Sir J. Coleridge, Solicitor-General, objected to the question, as not coming legitimately within the witness's evidence as an "expert."

The Lord Chief-Justice.—He is very well acquainted with figures, but I cannot accept the evidence of an accountant. As to the responsibility of parties whose names are upon bills, he can only tell us positive facts as to his knowledge. An adept or expert speaks to some matters of service or as to some matters of business with which he is immediately and peculiarly conversant.

It was proposed to ask the witness whether he was well acquainted with the commercial status of persons carrying on business in London.

The Lord Chief-Justice.—I do not think he is more competent to give an opinion on that matter than anybody else. It is not within his peculiar province as an adept. Matters of figures are within his province, but the commercial status of merchants in London is beyond his experience. He can only be asked as to specific facts within his knowledge.

It was elicited, however, from the witness that he had not taken the names of all the parties to the bills, and there might, for anything he knew, have been other solvent par-

ties liable on all of them, so that the contingent liabilities on these bills might never have taken effect, nor did it appear that they had; and the item therefore was disregarded, and the amount of liabilities was taken at £15,000,000, or, deducting the million, the amount of the partners' private balances, £14,000,000; and the shareholders' accountant stated, in fact, that the firm had a right to deduct that amount. The partners gave up all claim to it, struck it out of the liabilities, and it was, he said, a perfectly legitimate arrangement in that respect, and thus reduced the £4,000,000 deficiency to £3,000,000.

The shareholders' accountant was examined, in order to show that the business was not profitable, and stated that, though in 1858, 1859, and 1860 the firm had divided large profits—£240,000 to £360,000, and £216,000—yet that, from 1861 to 1865 they had not divided any profits, and had only taken their salaries. It did not appear, however, that the profits had not been made, but only that they had not been divided, in consequence of the losses incurred in these years in "advances of an exceptional character," which had not been repaid, and which constituted the £4,000,000 of bad or doubtful assets. But being asked whether, excluding these extraneous advances, the money-dealing and bill-broking business of Overend & Co. was or was not in a flourishing condition on the 31st January 1865 (the date of the transfer), he said he could not tell, as he had not separated the two heads of business.* He was unable, he admitted, to state whether, upon the money-dealing and bill-broking business alone, there were or were not large profits made from 1857 to 1865 inclusive.

He was unable, therefore, to say whether, at the time of the transfer, the money-dealing and bill-broking business of Overend & Co. was or was not in a sound and flourishing condition.*

* That is to say, the chief witness for the prosecution, after three years of investigation and deliberation, was unable to state whether the business sold was not abundantly profitable, this being the fundamental point in the case—the contract being for the transfer of the business—and the guarantee of assets being only collateral.

The Lord Chief-Justice.—That is a point which has appeared to me most important, whether supposing the four millions to be struck out of account altogether, the business was not sound.

The witness, however, was unable to say whether upon the money-dealing and bill-broking business alone large profits were not made from 1857 to 1867 inclusive.

The amount of doubtful assets was proved and admitted to be £4,000,000; deducting, however, therefrom £1,000,000 estimated at the time of the transfer to be good, and also £1,000,000, the amount of the private balances of the partners, leaving an apparent deficiency on the accounts of the firm of £2,000,000. It was admitted that, apart from the private estates, there was an insolvency, including the deposits as liabilities. The official liquidator being asked to state the position of the firm at the time of the transfer, he stated that this would depend upon the valuations made by the partners, at the time of the transfer, of their assets, and also on the amount of money belonging to the public which they had at that time. The credit of the firm, he said, was sufficiently good, at the time, to enable them to hold between twelve and fourteen millions; and, on the other hand, they used that money in their business,* and they had a given portion of the money out in bills which they had discounted, and advances which they had made upon goods. Their position would depend upon the soundness of their estimate of assets. That is, looking at the sums of money for which they were liable to depositors and others, and at the sums they had out at security in the conduct of their business, there would be a balance against them, unless they could bring to their aid the real value of the doubtful assets, and also their large private estates. He considered the estimate of a million as the value of the doubtful assets fair. Then that would leave a deficiency of £1,900,000, against which there would be the value of the private estates,

* Here, again, arises the nature of the business, *vide ante*, p. 2.

and also the £500,000 good-will of the business, including the premises. Then, as to the value of the assets and estates of the firm, he produced a paper in the handwriting of the defendant Mr J. H. Gurney, which, upon the whole, he pronounced a fair and reasonable estimate—

ESTIMATES OF THE ASSETS OF THE OLD FIRM, JULY, 1865.

Balances of Gurneys', Norwich	£787,000	
Less amount transferred	196,719	
		590,281
Land		556,000
Sundries		618,000
Reversions		92,000
Life interests		97,000
		£1,948,281
Estimated value of good-will of Norwich Bank	300,000	
		£2,248,281
Suspense and guarantee account	4,218,896	
Reduced by partners' balances	1,053,715	
		£3,160,181
Further reduced by estimated value of excepted amounts	1,082,000	
		2,078,181
Apparent surplus		170,100
Good-will of the business		500,000
		£670,100

He stated that, in some of these heads—for instance, the reversions—the real value exceeded the estimate. As to the value of the good-will of a bank, again, he said the estimate was under the usual estimate, which was five or six years' purchase, whereas the above estimate was only at four years.

Asked as to whether, on the whole, the firm were solvent at the time of the transfer, he said that, excluding the private estates, they were not.* Supposing the firm had

* This, it will be observed, was the answer of an accountant, only on the figures, taking all the debits as debts, and debts presently payable, and including in the amount the deposits, which were in a different position from the money of customers in the hands of bankers on drawing accounts (*Edward v. Vere*, 25 B. and Adolphus, rep. 282), and did not really represent an amount of present liabilities, as they were, in the ordinary course of business, replaced as they were withdrawn. Moreover, it assumed as a definition of insolvency, a capacity for instant payment of all possible liabilities. This might be so as a matter of figures, but not as a matter of fact.

stopped payment on that day, instead of transferring their interest, there would, so far as the joint estate the partnership property was concerned, have been a deficiency. Asked as to the probable dividend that would then have been payable—whether it would have been more than ten shillings in the pound, he said he thought it would. But he pointed out that of the amount of liabilities, about £5,000,000 were for deposits.

The Lord Chief-Justice, at the close of the examination of the official liquidator. — Was there anything in the books to lead you to think that if the business were conducted as a bill-discounting, money-dealing business ought to be conducted—without any of its funds being applied to purposes foreign to such business—was there anything to prevent the business from being conducted as prosperously and satisfactorily as it had been before?

Witness.—I think not. Such is my opinion from the result of my examination. I have given the matter a great deal of consideration, and I am of opinion that if the firm had not formed themselves into a company, they might have been in existence at the present time. For I do not think that their position was worse at the time of the transfer than it had been in 1864.

At the close of the witness's examination, the Lord Chief-Justice desired to ask him whether, if the deficiency on the sum of £4,000,000 on the excepted accounts had been met by fresh capital, or by funds of the firm, and if the crisis had not occurred in May 1866, the business would still have been profitable?

The witness said he was of that opinion.

II. The next head of evidence related to the formation of the company, the terms of the transfer, and, in particular, to the preparation of the prospectus and the deeds.

As to these matters, the principal witnesses were the solicitor and the secretary. It was at first proposed to put in the documents alone, and the solicitor was called upon to produce and prove them as attesting witness.

The Solicitor-General, however, proposed to elicit from the witnesses the circumstances attending their preparation.

Mr Kenealey objected to this course, and urged that the documents must speak for themselves.

The Lord Chief-Justice.—Not when you go into the question *quo animo*. The whole question arises, not upon the effect of their deeds, but upon the fraudulent *intention*, suggested as the part of the prosecution. And the witness can give us evidence as to the intention. He can explain what passed—what instructions he received.

The witness—the solicitor who had acted for the firm, and had attested the deed—was accordingly examined, and stated that in June 1865, a meeting took place, at which all the defendants (except Mr G. Barclay) were present, and discussed the matter. Mr Gordon, he said, was a gentleman very well known in the city as a reasonable man. He was chairman of the Oriental Bank, and he was not in the least mixed up with the firm. Mr Rennie was a merchant, a customer of the concern, but with no interest in it. Mr Gibb also had no connexion with it. They were all four men of exceedingly good position. There was a discussion as to the terms of a purchase, and as to what prospectus should be issued. The subject of the prospectus was the principal topic. The price of the good-will of the old firm was discussed, and the sum of £500,000 was mentioned. The vendors were to guarantee the company against losses from the assets they were to take over on the purchase. And they were to be allowed a period of three and a half years to realise a certain class of assets which it was not considered expedient to transfer to the old company. They were claims on assets in liquidation: all property of that kind; that is, amounts which might be doubtful—assets of uncertain amount. They were not to be taken over by the company, because they were not profit-bearing, and were to be wound up by the old firm. The

period of three and a half years was to be allowed for winding them up by the old firm. The net amount which might remain from time to time upon the balance due on those accounts, was guaranteed to the company by the firm. They gave their guarantee against ultimate loss in respect of the balance of those accounts. The proceeds were to form part of the funds of the company. In the meantime, they were to represent a credit to the old firm of the amount from time to time due upon them. And if in the end there was a loss upon them—a difference between what was realised and the nominal value of these assets—it was to be made good by the joint and several guarantee of the old firm.

Meanwhile, these assets amounted nominally to £4,000,000, to be found in the "Suspense and Guarantee Account." In the meantime, until these assets had been realised, they were not to represent that sum of £4,000,000, but there was to be a credit granted to the old firm to an account equivalent to the balance due from time to time on these assets.

The Lord Chief-Justice.—As I understand it, part of the terms of the contract between the old firm and the new company was, that the old firm should transfer to the new company all the assets. If these doubtful assets of four millions were really so much money, there would be a transfer at once of assets to that amount; but it was doubtful whether those four millions of nominal assets would realise anything like that large sum. Therefore the old firm said, we will make over to you all our assets, but these being doubtful, we will bind them up, and if, in the end, it turns out that they are worth less than their nominal value, we will guarantee you that we will make good the difference.

Witness stated that it was so, with this addition—that the assets did not bear interest, being locked up and in liquidation, whereas the firm guaranteed interest upon the balance, so that they, in fact, converted them into a profit-

bearing capital. These assets were never, in truth, transferred at all.

The Lord Chief-Justice.—It comes to this, that the company were to have all the assets, but as there were some doubtful, these were not to be made over, but that if anything was to be realised upon them, it was to be paid over, and the whole was to be guaranteed. In other words, they guaranteed what these assets should realise.

The witness assented, and proceeded to state that the excepted accounts, nominally amounting to £4,000,000, were not expected to realise above £1,000,000. And there was a calculation and valuation made of the private property and the bank property for the purpose of ascertaining what the property of the guarantors might be expected to realise. The result was, that there would be a considerable surplus. At a subsequent meeting, a prospectus was produced, which was printed and circulated among the directors, and when it was settled I was instructed to prepare the Memorandum and Articles of Association. And I received general instructions to do what was necessary. I therefore put myself in communication with a conveyancer, Mr Braithwaite. I gave him no instructions in writing, except copies of the Prospectus, and Memorandum, and Articles of Association. I gave him oral instructions to prepare the deed, or deeds, or agreement for the transfer of the business, explaining at the same time the arrangement with reference to the accounts, which were not to be transferred, but guaranteed by the old firm to the company. I came here on one or two occasions with Mr Gurney, when the subject of conference was the mode of binding the proceeds of these excepted accounts that came in, and the mode of keeping the accounts. I gave him no instructions as to whether there should be two deeds or one; that is always left to counsel. A conveyancer would prepare one or two deeds as he might think desirable. I had two drafts from him, and got them copied, and took copies to lay before Messrs Gordon and Rennie, who

said that it would be more satisfactory that the partners should have the deeds looked over and settled by some independent counsel, and I left the drafts with Mr Gordon, who promised to return them through the solicitors of the Oriental Bank. They instructed counsel who very materially altered the drafts, and counsel on both sides had meetings.

On the 11th July the first deed was not sealed, and the other had not been gone into. The 12th July was the day that had been settled for the issuing of the prospectus and we got the draft of the first deed settled at once, as being the deed which formed the contract. It was not until four or five days afterwards the consideration of the second deed was entered upon. There was a great deal of discussion on it; and it was not completed until the 27th July. Both deeds bear that date, but they were not executed until the 8th August. The deeds were left in my custody.

When the share secretary, in consequence of a letter from the Stock Exchange Committee, applied to me for what was necessary for the Stock Exchange, I sent the first deed only, because it was the contract between the vendors and the company, and the only deed referred to. That was on the 12th August. I had no instructions from any one to keep back the second deed. I acted entirely on my own responsibility. There was a third deed of the 2d August, executed by all the defendants, the object of which was to give the new company greater security by providing that in the case of bankruptcy or death of any of the parties to the guarantee the estates should be realised at once, but the third deed was not executed until September. The second deed was not material with reference to the transfer. There was no difference between the first and second. The second was collateral to the first. They are not antagonistic at all.

The Lord Chief-Justice.—The first deed refers to the excepted accounts, and then shows that although all the

assets are to be transferred, it is subject to this, that such assets only are to be transferred as the new company may think it proper to undertake. As I understand it, by the first deed all the assets and liabilities are to be transferred to the new company, subject to a certain guarantee as to the value of the assets, but the first deed contemplates a power in the company to reject such of the assets of the firm as they may not think it expedient to take. Then the second deed provides for what shall be done with reference to those assets which the new company decline to take. Then there is a provision that with reference to all such accounts as are enumerated in the schedule, the company shall get what they can from them, and then the second deed limits the time for doing so to the three years and a half. The old firm guarantees to the new that all assets realised shall be paid to the new; and that at the end of three years and a half the difference between the assets realised and the nominal value shall be paid by them out of their own private funds. Its value to the company depended practically on the sufficiency of the guarantee.

Proof was given of the following letters written about the time the company started. At the time that the prospectus was drawn, Mr Daniel Gurney addressed the following letter to his nephew, Mr J. H. Gurney, one of the present defendants—

"My dear J. H.,—You appear to have done quite the right thing in negating the proposal of continuing O., G., and Co.'s business; and I think, if the result is successful, we shall all rejoice. I regret very much that you think you have overrated the excess, and I trust that when you go accurately into the figures it will not turn out to be the case. I should hope the termination of the American war might lead to greater ease in selling the ships."

That letter was indorsed by the receiver of it, Mr J. H. Gurney, "25 May 1865. D. G. as to estimate of surplus." On the 24th of June in the same year, Mr Daniel Gurney sent his nephew the following letter—

"My dear J. H.,—Your two letters of the 23d I received this morning.

I am sincerely pleased that everything is in good train for the formation of the new company, and I trust all will go well in starting it, and that you may find a fourth desirable director. Your account of Mr Gibb is very satisfactory. . . . But I certainly feel a very great objection to our joint and several guarantee for the deficiency of the new company, both because it places our marriage settlement bonds on a *pari passu* level with the fresh bond and also abstracts our private assets from our Norfolk creditors, or rather places them after the requirements of the liquidation fund. I doubt whether the first of these results is justifiable. I think it might be proposed to the independent directors, that, at all events, our marriage settlement bonds ought to precede that now to be given. I should be sorry to trammel the negotiations in any way, but I doubt whether this proposed several security is quite honourable to the families into which my children have married. Perhaps you can make an effort on this point, but I feel that the case is urgent, and I must leave it in your hands. I think it likely the elections will oblige us to put off the settlements until the beginning of August.

"Is there a condition that we must not sell our shares of the new company under a certain time? I am kindly sensible of your great kindness as to what you say respecting your being willing to make a sacrifice in my favour when it comes to the appropriation of losses."

A third letter ran as follows, dated 4th July 1865—

"My dear J. H.,—I have looked over my marriage settlement, which is very much as I supposed. The amount of £20,000 was to be invested in mortgage on Government Stocks, and £12,000 was on mortgage, and £8000 remained in my hands, a bond of Samuel Gurney and Samuel Hoare being given for it; both of these are now paid off, and the money entirely in my hands. It is a very awkward case, and I cannot think I ought to place the amount on the same level of security as my bond to O., G., and Co.

"In short, I feel very uneasy about this and the marriage settlements of my daughters and sons, especially the former. I acceded to your kind proposal of giving security, but you must bear in mind that in the case of a real catastrophe all my family and myself would be in total destitution, or almost so, and I do not see how these settlements would be protected. I hope Charles will come to-morrow, but I cannot help thinking the independent directors of the new company would allow our present private debts to precede the bonds about to be given."

Indorsed—

"June 1865. D. G. to J. H. G. as to D. G.'s family settlements, and J. H. G.'s guarantee for a portion thereof under certain contingencies."

Upon these letters being read,

The Lord Chief-Justice observed that as he understood, notwithstanding the repugnance Messrs Gurney had felt to the disturbance of their marriage settlements, yet, in point

of fact, they had afterwards consented to the settlements being postponed to their obligations to the new company.

The Solicitor-General said that was so.

The Memorandum and Articles of Association were then put in.

The Memorandum of Association was in these terms—

“ I. The name of the company is Overend, Gurney, and Co. (Limited).

“ II. The objects for which the company is established are—the receiving of money on deposit or by discount of bills, and the employment and investment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange and other negotiable securities, and in making advances on loans ; and generally, the carrying on of the business of bill-brokers and money-dealers as heretofore carried on by Messrs Overend, Gurney, & Co.; and, with a view to the above objects, the acquisition of such business upon terms to be agreed by the directors, and the acquisition, by purchase or otherwise, of such other business of a like character, and upon such terms as the directors shall think fit, and the doing of all acts and things incidental or conducive to the attainment of the above objects.”

The liability of the members was limited. The capital of the company was £5,000,000, to be divided into 100,000 shares of £50 each. The subscribers or promoters were Mr Henry Edmund Gurney, who held 4000 shares; Mr John Henry Gurney, 4000 shares; Mr Robert Birkbeck, 2000; Mr S. Gurney Buxton, 600; Mr Henry Ford Barclay, 1000; Mr William Rennie, 400; Mr Harry George Gordon, 200; and Mr T. A. Gibb, 1000 shares.

Then the Articles of Association were put in, which stated that the first directors were Mr H. E. Gurney, Mr J. H. Gurney, Mr R. Birkbeck, Mr H. F. Barclay, Mr T. A. Gibb (since deceased), Mr H. G. Gordon, and Mr William Rennie. The two managing directors were to be Mr H. E. Gurney and Mr R. Birkbeck, who were to be in office, the first for five and the other for seven years, subject to which the whole of the directors were to retire from office at the first ordinary meeting of the company. By a clause in the articles, £5000 a year was paid to the managing directors, and after making allowance out of the net profits for a reserve fund, and the payment of a dividend

at the rate of 7 per cent., the managing directors were to be entitled to one-fifth of the surplus profits. By other clauses, an annual sum at the rate of £500 was to be paid to each director other than the managing director, for his services. Such sum was to be divided among the directors in such proportions as they should agree upon; and it was provided in effect that the company should have a lien on the shares of any holder indebted to the company in any way, whether the liability was actual or contingent, and whether separately or jointly with any other person. The certificate of incorporation of the company, dated July 12, 1865, was likewise put in evidence.

It was provided that—

“The company, or the directors on their behalf, may, for the purpose of carrying on the general business of the company, purchase or otherwise acquire any buildings, and especially those of Gurney; and the directors are also authorised to purchase or acquire upon such terms and stipulations as to guarantee or otherwise as may be agreed upon, the business and good-will of Overend & Co., as the same now stands; and the consideration for any property, business, or good-will to be purchased by the company or directors may be paid in shares, or money, or otherwise, by way of allowance on account as with the vendors, as may be agreed upon between the vendors and the company, or the directors, and any shares to be issued in payment shall be taken as paid up.”

The deeds were then put in and read.

The first deed, 27th July 1865, recited that arrangements had been made for the transfer of the business, and in order to express the terms of the arrangement it was provided—

“The vendors agree to sell and transfer, and the purchasers agree to take, accept, and purchase as a going concern, on the 1st day of August now next ensuing (being the day of completion hereinafter mentioned), the business of bill-brokers and money-dealers now carried on under the said style or firm of Overend, Gurney, & Co., and the good-will thereof with the benefit of the said style or firm, and the sole and exclusive right of thereafter using such name or style, and all gains, profits, emoluments, benefits, and advantages which shall, can, or may arise, or be had, gotten, or received from the carrying on of the said business on and from the said 1st day of August next, at or for the price or sum of £500,000 to be paid and satisfied by the said limited company to the vendors, or allowed in, or brought into account between them as hereinafter mentioned,

and under and subject to such other terms and stipulations as are hereinafter expressed or contained."

The 3d Clause provided—

"The said limited company shall, on and from the said day of completion, inclusive of such day, carry on the said business, and shall be exclusively entitled to all gains, profits, emoluments, benefits, and advantages thereof, or incident thereunto, which can thenceforth be had, made, gotten, or realised therefrom, and save as hereinafter is provided, shall be exclusively liable to, and shall bear the losses (if any) which shall, or may arise, or result from, or in respect of any transactions entered into by the said limited company in connexion with, or incident to, the said business, on or subsequently to that day."

The 4th Clause provided—

"The said price or sum of £500,000 shall be paid and satisfied, or treated as paid and satisfied as follows—viz., the sum of £250,000, being one moiety thereof, shall be paid, or treated as paid by being brought into, and allowed in account as between the vendors and purchasers as being paid to the vendors by the purchasers in cash on the said day of completion, and the sum of £250,000, being the remaining moiety thereof, shall be paid, or satisfied, or treated as paid, or satisfied by the said limited company, issuing, or allotting upon, or as soon as possible after the said day of completion to Overend, Gurney, & Co., or their nominees or nominee of 16,666 shares of £50 each in the capital of the said limited company, on which the sum of £15 per share shall be treated and deemed to have been paid up, and shall be brought into, and allowed in account between the vendors and purchasers as being paid upon the said day of completion in discharge of moneys then or thereafter to become payable by way of contribution to capital in respect of such shares, and such sum of £15 shall be credited in the books of the said Company as paid up on that day accordingly."

The 5th Clause was in these terms—

"Provided always that the said limited company shall be entitled, as far as the directors of the said company shall require, to have the said price or sum of £500,000 so to be paid and satisfied, or to be treated and brought into, and allowed in account between the vendors and purchasers as being paid by the purchasers as aforesaid, applied and made available by way of material guarantee, in aid of the covenants of the vendors herein contained for insuring the due performance, observance, and fulfilment of such covenants, so far as the same shall, from time to time, remain to be performed, observed, and fulfilled, and that the obligation of the said limited company in respect of the payment, or allowance in account of the said price or sum of £500,000, both as regards the portion thereof to be paid in cash, and the portion thereof to be paid, or satisfied in shares as aforesaid, shall be controlled by the right of the said limited company to have the same so applied and made available, and such obligation shall not be enforced or enforceable by the vendors otherwise than or except in subordination to the right of the limited company to have the same so applied and made available."

The 6th Clause provided as to any accounts which might be objected to by the company, they should be excepted from the transfer and be otherwise provided for. The clause provided—

“Except such accounts as the directors of the said limited company shall require to be reserved or excepted to be wound-up and closed by Overend, Gurney, & Co. as hereinafter provided, all accounts connected with the said business, which at 12 o'clock at midnight of the 31st day of July inst., shall, as appearing by the books of the said Overend, Gurney, & Co., be opened or unsettled, and subsisting between Overend, Gurney, & Co., and any other person or persons, whether a balance shall be struck thereon or not, save and except accounts subsisting between Overend, Gurney, & Co., and other person or persons, which shall be confined to moneys held by them on deposit or at call, on which no interest shall have been actually paid by Overend, Gurney, & Co. for the period of six years and upwards, next immediately preceding the said day of completion, shall be carried on and continued between the said limited company in the place of, and by way of substitution for Overend, Gurney, & Co., and such other person or persons, so far as such other person or persons shall not dissent therefrom, as the same might have been continued and carried on between Overend, Gurney, & Co., and such other person or persons.”

The 7th Clause ran thus—

“The said limited company shall be absolutely entitled to the benefit of the cash balances to which Overend, Gurney, & Co. shall at 12 o'clock at midnight of the said 31st day of July inst. be entitled upon their banking accounts (whether deposit or drawing accounts) with Messrs Barclay, Bevan, Tritton, & Co., and the Bank of England respectively, or any other bankers with whom Overend, Gurney, & Co. shall have a banking account, and such balances shall be paid or transferred on the said day of completion to the said limited company, and the said limited company shall save as is hereinafter provided, with respect to the bills, promissory notes, mortgages, securities, and property held by the vendors to the credit of, or as belonging, or applicable to, any accounts which shall be reserved or excepted to be wound-up and closed by Overend, Gurney, & Co. as hereinafter provided, have and be entitled to the benefit of all cash in hand, bills, notes, negotiable instruments, and securities, whether arrived at maturity and over-due or current, and all debts whether over-due or current, bonds, judgments, mortgages, and securities for the payment of money, liens, guarantees, and generally all and singular the property, estate, effects, and assets, whether real or personal, movable or immovable in possession.”

The 8th Clause provided—

“The said limited company shall undertake and bear in exoneration of Overend, Gurney, & Co. all obligations and liabilities, to which, at the hour of 12 o'clock at night on the said 31st day of July instant, Overend, Gurney, & Co. shall be subject for, or in respect of, the repayment of any

moneys which at that time shall in the books of Overend, Gurney, & Co. appear to be held by them upon call, or deposit, or for payment of interest for the same moneys, and shall pay and satisfy such moneys and interest to the person or persons respectively entitled thereto, as and when the same shall be drawn for, or otherwise lawfully demanded in the regular course of business."

The 9th Clause contained a similar provision as to bills of exchange, &c.

The 11th Clause (the guarantee clause) ran thus—

"The vendors guarantee the said limited company that irrespectively of any value to be attributed to the good-will of the said business of Overend, Gurney, & Co., their assets, of which the said limited company shall have and take the benefit on the said day of completion, shall, upon the actual realisation thereof, after deducting or allowing all expenses of realisation, produce a net amount of money equal to, or exceeding the aggregate amount of the moneys which the said limited company may have to pay, or provide, or shall pay, or provide in satisfaction, and discharge of the obligations and liabilities of Overend, Gurney, & Co., which the said limited company shall be required or called upon to discharge, or satisfy by virtue of their covenants herein contained."

And the 12th Clause was—

"Further, and more particularly, and without prejudice to the generality aforesaid, the vendors guarantee to the said limited company that all debts due and payable to Overend, Gurney, & Co., which shall be taken over by the limited company as part of the assets of Overend, Gurney, & Co. as aforesaid, whether over-due or current, are good and recoverable in full, and shall be paid in full to the said limited company. And the vendors also guarantee to the said limited company that the full amount of money secured, or made payable by, or upon any bills of exchange, or promissory notes, bonds, mortgages, judgments, or securities for money, which are to be taken over by the said limited company, as being part of the assets of Overend, Gurney, & Co., shall also be paid to, and received by, the said limited company. And further, that if, and so far as, the parties who may be liable to the payment of such debts or moneys, shall make default in payment thereof, the deficiency or loss shall be paid and made good by the vendors to the said limited company."

The 16th Clause ran thus—

"Notwithstanding anything hereinbefore contained, the vendors, or any one, two, or more of them, as they may agree amongst themselves, shall not only be at liberty, but it shall be obligatory upon some or one of them to continue to act under the style or firm of Overend, Gurney, & Co. for the purpose of winding-up, closing, liquidating, managing, settling, and arranging any outstanding accounts, debts, liabilities, transactions, business matters, affairs, or things incidental to, or connected with, the business of Overend, Gurney, & Co., which the directors of the limited company shall

consent, or deem it desirable or expedient, should be wound-up, closed, liquidated, managed, settled, or arranged by Overend, Gurney, & Co., and no bills, promissory notes, mortgages, securities, or property of any description, which, on the 31st day of this instant month of July, shall be held by the vendors to the credit of, or as belonging, or applicable to any accounts so to be wound-up and closed as last mentioned, shall be transferable, or transferred to the said limited company as part of the assets of Overend, Gurney, & Co., but the same shall be reserved and excepted by Overend, Gurney, & Co. to be retained, appropriated, applied, and disposed of by them, and under the control, for the purpose of winding-up and closing such accounts, and Overend, Gurney, & Co. shall be at full liberty to do all such acts and transact all business, whether in the way of discounting bills, enforcing the payment of securities, or otherwise howsoever, which shall in their judgment be necessary or proper for managing, working, winding-up, and bringing to a final settlement the accounts which may be so selected for being wound-up and closed as last aforesaid, together with all outstanding engagements and liabilities in connexion therewith or relating thereto."

The second deed provided for the excepted accounts. After reciting the previous deed to a great extent, it went on to define the words "the suspense period," which were to be afterwards used in the second deed, to be between the 31st day of July instant, 1865, and the 31st of December 1868, and to say that the words "*the excepted accounts*" to be afterwards used should mean and include the *outstanding debts, accounts, liabilities*, and matters incidental to or connected with the business of Overend, Gurney, & Co., which the directors of the limited company should deem it expedient to be wound-up by Overend, Gurney, & Co. The second deed then went on to say that on the 1st of August 1865, a separate ledger should be provided, to be kept by Overend, Gurney, & Co., to be called "the old firm ledger of excepted accounts," which was to show the progress made in winding-up and liquidating those excepted accounts; and it was provided—

"That all the outstanding accounts, debts, liabilities, transactions, business matters, affairs, and things incidental to, or connected with, the business of Overend, Gurney, & Co., which are, or can be comprised within the general description set forth in the schedule, hereto shall be deemed to be excepted accounts, and shall be the subject of ledger entries to be made by or under the direction of Overend, Gurney, & Co., according to a proper mercantile system of book-keeping in the said ledger, and such excepted

accounts shall, on the said day of completion, be transferred into the said ledger, and shall thenceforward be wound-up and closed by and under the superintendence of Overend, Gurney, & Co."

The schedule, as above indicated, contained only a general description of the excepted accounts. It ran thus—

"All accounts subsisting on the said day of completion between Overend, Gurney, & Co. and the Millwall Iron Works Ship-Building and Graving-Dock Co. (Limited), and all accounts subsisting on that day between Overend, Gurney, & Co., and any other person or persons in respect of any shares in the said company owned by or hypothecated to the said Overend, Gurney, & Co.

"All accounts subsisting and unsettled on the said day of completion between Overend, Gurney, & Co., and any company, partnership, firm, or individual, the affairs of which are now in course of being wound-up, liquidated, settled, adjusted, or arranged either in the Court of Bankruptcy, or voluntarily, or involuntarily under the Companies Act, 1862, or other statutable power or authority, or under any arrangement or agreement made by such company, partnership, or individual for the benefit of their creditors or any of them.

"All accounts subsisting and unsettled on the said day of completion between Overend, Gurney, & Co., and any company, partnership, firm, or person, or estate, in respect of any advances, loans, or investments made by Overend, Gurney, & Co., in or upon the shares, debentures, stock, or property of any company incorporated or unincorporated, which has been dissolved and wound-up, or which or the affairs whereof is or are in course of being wound-up either compulsorily or voluntarily, and either under the Companies Act, 1862, or under other statutable authority, or provision, or otherwise howsoever.

"All accounts which on the said day of completion shall be open in the books of Overend, Gurney, & Co. in respect of any unrealised property or securities (if any), accepted or taken by Overend, Gurney, & Co. in satisfaction or settlement of any account which has heretofore been open or subsisting and unsettled between Overend, Gurney, & Co., and any other person or persons whomsoever."

Except the Millwall Company, no debtors were named, and no amounts were mentioned at all.

The 5th Clause provided that—

"A debtor and creditor account, to be called "Overend, Gurney, & Co.'s Suspense and Guarantee Account," shall be opened by the said limited company, and Overend, Gurney, & Co. respectively on the said day of completion, in books to be provided by them respectively for that purpose, and the books in which such accounts shall be opened and kept, shall always remain at the office for the time being of the said limited company, and the said account so to be opened shall be kept as an account-current

between them respectively, in debtor and creditor form, for the purposes hereinafter expressed, and in the manner hereinafter provided."

Then it was provided, as to the account so to be opened for the excepted accounts, Clause 6—

"The said Suspense and Guarantee Account so to be opened and kept shall be debited on the said day of completion with the total amount of the balances which, as struck on the said excepted accounts at 12 o'clock at midnight of the 31st day of July instant, shall appear to the debit of such accounts, and the amount so to be debited shall be considered and treated as representing and equivalent to moneys to that amount due to the said limited company from the vendors upon an account stated between them on the said day of completion, but to be liquidated in account-current between them as hereinafter provided."

And, Clause 7, as to moneys due upon it—

"There shall also be from time to time placed to the debit of such account all such sums as shall, during the suspense period, become due to the company from the vendors."

Then Clauses 8 and 9, as to rebate and interest on bills; and then Clause 10, as to credit—

"The account shall be credited with the sum of £250,000, half of the price of the business; and also with the balance due on 'The Private Ledger Account'—i.e., the private balances of the partners."

And Clause 11—

"And all such sums as shall be realised or received by Overend in respect of the bills, notes, securities, or property by the first deed declared to be rescued or excepted out of the assets."

And Clause 13, as to fresh advances—

"Any sums which the company shall from time to time lend or advance to Overend for the purpose of enabling them to wind up and close the excepted accounts, or realise any of the securities, shall be carried to the debit of the account."

Then, as to the close of the account, Clause 17—

"If, at the expiration of the suspense period, the balance of the account shall be on the credit side, it shall be deemed a balance due from the company to the firm; if on the debit side, it shall be deemed a balance due from the vendors to the company."

Clause 18—

"All obligations incurred by the company under the first deed in respect of the payment of the £250,000, or on the shares in respect of the other moneys, shall be satisfied on the debts and credits to be carried to the suspense and guarantee account; and all obligations of payment incurred by the vendors under their costs and guarantees in Clauses 10, 11,

12, 14, and 15 of the first deed, and in the 6th clause of the present deed, shall be satisfied in the same manner."

Clause 19—

"The company to have a cautionary lien on the shares to be allotted to Overend, which shall remain unsold."

When the deeds were referred to.

The Lord Chief-Justice said, The first deed provides for the transfer to the new company of all the debts, assets, and securities of the old firm, with the exception of such of the outstanding debts due to Overend, Gurney, & Co. as the company should choose not to adopt; and then, there having been a provision to that effect in the first deed, the second has reference entirely to the debts so to be excepted. The schedule enumerates those debts, and the provisions of the second deed have reference throughout to nothing but what was done between the two companies as to those excepted debts. The schedule, therefore, having determined what debts should not pass to the new company, the new company have no interest in anything that relates to those debts, except so far as it is desirable that they should be got rid of, so as not to stand in the way of the respectability of the new company.

The drafts of the deed were called for and produced by the solicitor of the defendants, and in particular, counsel's drafts of the first and second deeds.

The rough draft of the second deed was dated 18th July, several days after the prospectus was issued. The draft of the second deed was signed by counsel. Then the drafts settled by counsel were produced.

The Lord Chief-Justice, looking at the draft of the second deed, originally drawn by counsel on behalf of the old firm, and settled by counsel on behalf of the vendees—the new company—observed that it was evident that the latter had exercised a very strict scrutiny into its provisions, for every clause was altered.

The witness said every clause was re-drafted, so that scarcely a sentence of the original draft remained.

The Lord Chief-Justice desired to ask the witness one or two questions. The prospectus stated that the deed—the original deed of transfer—was to be seen at his office. How many persons had been to see it?

Witness stated about thirty or forty.

The Lord Chief-Justice.—There was a resolution by which the secretary was directed to apply to you for the documents required to satisfy the Stock Exchange. Had you any directions or any suggestions from the directors as to what documents you should send or as to what you should withhold?

Witness.—None whatever, directly or indirectly, from any one. In giving Mr Slater the documents I did give him, I acted entirely on my own responsibility.

The prospectus was put in. It was issued, it is to be observed, on the 12th July, before the second deed was settled, and before either of them had been executed.

It was in these terms—

“Overend, Gurney, & Co., incorporated under the Companies Act, 1862; the capital to be £5,000,000, in 100,000 shares of £50 each, of which it is not intended to call up more than £15 a share. There is to be a deposit on application of £2 a share, £5 a share on allotment, £4 a share on September 15, and a like sum on November 15. Then followed the names of the directors. Three of the directors of the new company were John Henry Gurney, Henry Edmund Gurney, and Robert Birkbeck, who had been partners in the old firm, and the other directors were Henry Ford Barclay, T. A. Gibb, Harry George Gordon, and William Rennie. Those seven were the directors of the limited company.”

The prospectus went on to state—

“The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs Overend, Gurney, & Co. of their long-established business as bill-brokers and money-lenders, and of the premises in which the business is conducted; the consideration for the good-will being £500,000, one-half being paid in cash and the remainder in shares of the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders.

“The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

"Three of the members of the present firm have consented to join the Board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr Henry Edmund Gurney and Mr Robert Birkbeck) will also occupy the position of managing directors, and undertake the general conduct of the business.

"The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the Board of Directors, who also propose to retain the valuable services of the existing staff of the present establishment.

"The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders.

"Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of business, can be inspected at the offices of the solicitors of the company."

The deed here alluded to—the deed of transfer—was so deposited and open for inspection.

Evidence was then given as to the allotment of shares, and as to the sending of the documents relating to the company to the Stock Exchange subsequent to the allotment or the application for a settling day. This evidence was given by the secretary. He was examined first as to the allotment of shares. The allotment was completed, he said, on the 28th of July. The witness was secretary as to the allotment of shares; another person, afterwards appointed, being secretary of the company. One or other of them always attended the Board meetings. The allotment was completed on the 28th of July. The whole of the shares were taken either by the public or the directors of the company. The new directors took shares in these proportions:—Mr Barclay, 1000; Mr Gibb, 1000; Mr Gordon, 200; Mr Rennie, 200. The old firm took none upon the allotment, but, by the terms of the contract, they were to take 16,666 (in payment of half of the consideration, £250,000) at £15 per share paid up. Of these they sold 8300 shares, the proceeds of which—£172,633—went to the credit of the suspense and guarantee account. The members of the old firm took in these proportions:—Mr S. Gurney, 4666; Mr H. Birkbeck, 2000; Mr H. E.

Gurney, 4000; Mr J. H. Gurney, 4000, and Mr R. Birkbeck, 2000.

The witness stated that from first to last he had been engaged in the share department of the business. He ceased to be connected with the company in February 1866. At that time the £15 per share had been paid, and his services were dispensed with, as previously understood. It was stated in the prospectus that it was not intended to call up more, and his services, as he expected, were dispensed with. The allotment and registration of shares was his duty. On the 2d August, applications for 224,119 shares had been received, of which only about 83,000 could be allotted to the public. He had been exclusively occupied with the allotment of shares. Minutes as to the allotment were entered in one book by himself; minutes as to the ordinary business were kept by the secretary of the company in another book.

The witness was next examined as to the execution of the deeds, which, it is to be observed, were executed after the allotment. Witness read a minute of the 27th of July 1865, at a meeting at which the Messrs Gurney and Mr Rennie were present (on the occasion of allotment of shares)—

“Resolved,—That Mr Jones (the solicitor), having reported that both the deeds were settled, the seal of the company be affixed to each of them, and that he be requested to retain them in his custody.”

On the 8th of August, he saw the seal of the company affixed to three deeds. One of them was the deed of mutual covenant, and was dated the 27th of July; and another of the same date was the deed of arrangement on the basis of contemporaneous indenture. A third was a supplemental deed. The deeds were signed by the directors, the defendants; except that Mr Barclay only signed the last, which, however, recited the others. He was not privy to the prospectus.

The witness proved that on the 8th of August 1865, at a meeting at which the principal defendants were present,

it was resolved that the resolutions as to the deeds be entered in a separate minute-book, reserved for the ordinary business of the company, unconnected with the allotment and registration of shares, and that an application having been received from the Stock Exchange, the secretary was requested to furnish the Stock Exchange with the particulars required, and to obtain Mr Jones's assistance, if needful. Witness read a minute of the 8th of August 1865—

"That the secretary having submitted to the Board the letter from the Stock Exchange, relative to the information required by the committee as to a settlement day for the shares of the company, the secretary be requested to furnish the committee with the particulars he requires, and to obtain the assistance of the solicitor in doing it."

Witness then stated that he applied to Mr Jones (the solicitor of the defendants) for his assistance to furnish him with such documents as the Stock Exchange might require.

The witness, in his reply to the committee, said he sent what they had required. Witness received from the defendants' solicitor the certificate of incorporation, and the prospectus, &c., with a deed; that is, the first deed, as it is called, the original deed of covenant upon the transfer of the business, and this he sent to the Stock Exchange on the 12th of August. He had received and sent only one deed—that just referred to. In the letter to the Stock Exchange, he forwarded a certificate stating that applications for 224,484 shares had been made by the public; that 365 of those were withdrawn before the allotment was made; that 83,334 shares had been allotted, on a payment of £570,321; and that the number of shares taken by the vendors in part payment was 16,666.

The secretary of the Stock Exchange being called to prove the documents he had received, which included only one deed, was asked what deeds or documents he should expect to receive—and replied that, according to their rules, they would require information in support of the correctness of the prospectus; and being further asked,

stated that they would expect that any deed of covenant by a firm which had sold its business to a company would be produced.

This closed the evidence under this head as to the formation of the company. The next head of evidence related to the circumstances attending the acquisition of shares by the prosecutor or other shareholders.

The prosecutor stated that he had read the prospectus, and studied it carefully,* and afterwards purchased shares through a broker. He was induced, he said, to take the shares by his knowledge of the respectability of the directors, especially Mr Gordon, whom he knew as chairman of a bank to which he belonged.† Being pressed further to state what were the specific clauses in the prospectus which induced him to become a shareholder, he said it was the clause which stated that no more than £15 a share would be required.

Sir J. Karslake pointed out that there was no such clause; and upon that the prosecutor, referring to it, said that that was so, no doubt, and the words were, "that it is not *intended* to call up more than £15 per share."

But he said he had relied on that, and had purchased just as many shares as he could pay that sum upon. He was greatly influenced by the name of Mr Gordon, and the statement that three of the members of the old firm would remain in the company. That greatly influenced him, from what he knew of the hereditary and traditional character of the house. So the expression as to business of a "first-class character." He stated that at the time he took the shares he had no idea of a second deed, and he heard of it first from the report of the liquidators, which mentioned the second deed, and the suspense and

* How carefully he read it will be seen when he came to state what it represented; and it is a curious illustration of the careless way in which shareholders read statements they afterwards complain of as fraudulent, simply because they had not been at the trouble to understand their effect.

† Thus he distinctly stated that he had taken the shares on the credit of the names and that, no doubt, was the truth. What follows was, it will be seen, afterwards held not to be evidence.

guarantee account. He had called at the office of the attorney to see the deed, but was told that it had been removed to Change Alley immediately after the allotment, at the end of July 1865. He made no further inquiry about it, and did not see it until afterwards. Had he seen the second deed before he took the shares, he would not have taken them.* In the first deed there are allusions; but viewing the first deed by itself, I should not have come to any very alarming conclusion. I think the schedule of the second deed would have made it clearer to me. The amount is not mentioned there; but, from the character of all the items in that schedule,† I think I should not have taken the shares; that is my opinion now. Being pressed still further by the counsel for the prosecution to mention what clauses in the second deed would probably have influenced him, he referred to the 1st, 13th, 17th, and the schedule. The first, he said, pointed to a suspense fund of three years and a half. If he had seen that, it would have filled him with alarm.

Sir J. Coleridge objected to this kind of evidence, but for the present it was admitted, although afterwards, on further consideration, rejected.

The first clause mentions the "excepted" accounts to be wound up by the old firm. The 13th clause was, that any sums which the company had lent to the old firm for enabling them to wind up the excepted accounts should be carried to the debit of the suspense and guarantee account. The 17th clause was, that if, at the end of the suspense period, the balance was on the credit side, the balance was to be considered as a debt due from the company to the vendors; and if, on the contrary, the balance was on the debit side, it was to be treated as a debt due from the

* This evidence, it will be seen, was afterwards declared inadmissible; and it was obviously worthless, as mere opinion, after the event, as to what would have been the effect of certain matters not then known. But it will be observed with what extreme doubt the opinion is conveyed.

† There were no items in the schedule. Only one indebted firm was mentioned, and no debt was mentioned. There was only a general description, such as probably might be found in any deed for winding-up a partnership.

vendors to the company. The schedule described the accounts between the old firm and other firms whose affairs were in course of liquidation, &c.

He went on to the second deed, in which he gave the 13th clause—

“That any sums which the company may advance to Gurneys for the purpose of enabling them to wind up and close the said excepted accounts, or to realise any of the bills, &c., shall be repaid by the vendors.”

Then there was the schedule, which comprised—

“All accounts subsisting between Gurneys and the Millwall Iron-Works; all accounts subsisting between Gurneys and any company, firm, or individual, the affairs of which are in course of being wound up; all accounts subsisting between Gurneys and any company, firm, or estate in respect of any advances, loans, or investments made by Gurneys upon shares of any company which has been wound up; and all accounts open in the books of Gurneys in respect of any unrealised property or securities (if any) accepted or taken by Gurneys in satisfaction or settlement of any account which has heretofore been open or subsisting and unsettled between Gurneys and any person whomsoever.”

The prosecutor was then asked as to the accounts, but Sir J. Coleridge objected.

The Lord Chief-Justice observed that this could have had no influence on the prosecutor, as he had not seen them at the time. He observed, on another occasion, that the shareholders had purchased on the faith of the prospectus, not of the accounts.

In cross-examination, the prosecutor stated that he never went to the company's office at all for the purpose of seeing any document, or getting any information. He read that the articles and the deed of transfer were to be seen at the office; but he did not see them before he took the shares. He saw the articles of association almost at the same time, and understood (he said) from them that he was not entitled to see the books.

The Lord Chief-Justice observed, that the clauses in the articles of association, on that point, related only to shareholders.

The prosecutor, however, said that, in point of fact, he had not been to the office of the company to see either deeds or books before he took the shares. And he admitted

that if, instead of, the prospectus stating that the "deed" could be seen, it had been "deeds," it would probably have made no difference.

Several other shareholders gave similar evidence. One of them being asked what induced him to buy shares, said that he bought them on the general faith of the prospectus, and believing the Gurneys to be respectable. He had not seen the deed referred to in the prospectus, and had only ran his eye through the articles of association. He relied, he said, upon the respectability of the Gurneys; and if there had been a dozen deeds, he probably would have looked at none of them. He avowed, in answer to the Lord Chief-Justice, that he had, in this as in other companies, "*taken things too much for granted*." * This and other witnesses being asked if they would have taken the shares had they known of the second deed,

Sir J. Coleridge again objected, that such evidence was inadmissible. The Lord Chief-Justice, after taking time to consider and consult Mr Justice Hannen, said he had arrived at the clear conclusion that it was not admissible. † Such evidence, therefore, was rejected.

Another shareholder, however, admitted that if ten deeds had been open for inspection, instead of one, he probably would have looked at none of them.

Other shareholders gave similar evidence, and stated that they took the shares on the faith of the prospectus and the reputation of the Gurneys. They bought on the general credit of the house. One of them had read the deed of transfer before he took the shares; and he said he saw the terms were commercially rather in favour of the Gurneys; but, on the whole, he thought that it must be a

* Here is the great practical lesson of the case.

† This appears to have been the view of the Lord Chancellor, who, in his judgment on the case, observed—"Great stress was laid by the Vice-Chancellor on the second deed not having been brought forward; and it was said, that if the second deed had been produced, many persons would not have subscribed. How far an averment of that kind is to be taken as an averment of fact, I think is very doubtful. To say that any particular person would or would not have subscribed if this or that had been done, is predicting the future, and cannot be taken as an averment of fact. (*Overend & Co. v. Gurney and others*, 4 Law Reports, Chancery, 719.)

sound and valuable property, from the influence of their names. He purchased, he said, under the influence of the prospectus and the deed.

It should here be stated that no evidence was offered to falsify any of the specific statements in the prospectus; and, on the contrary, they were all apparently proved by the evidence for the prosecution, which, as already stated, proceeded rather upon the theory that the transaction had included a guarantee of assets known to be worthless, by reason of the alleged insolvency of the vendors. The prospectus stated that the vendors guaranteed any deficiency in assets transferred, but did not state anything as to the sufficiency of the guarantee, or the solvency of the vendors. In short, the prosecution was founded rather upon a supposed fraudulent concealment of insolvency than on any actual misstatement of facts in the prosecution.

This appeared to close the evidence in the case as to the circumstances under which the company was formed, and the public led and induced to take shares.

Then came the last head of evidence, as to the history of the company, and the causes of its failure.

The transfer, as already stated, took place on the 31st July 1865, and the new company commenced business on the 1st August. At that date the accounts in the books stood thus—

In the old firm's ledger there was an account opened to the company, who were debited with £8,500,000 for securities; £1,000,000 for advances; £1,345,000 for bills in hand; £120,000 cash; suspense and guarantee account, £4,200,000; and various smaller items, making up a total debit of £15,000,000. These were the debits of the old firm. Then the company was credited with £9,000,000 for loans; £1,900,000 country bankers; balances of the partners' private accounts, £1,000,000; and single deposits, £2,600,000; and other smaller sums, making up £15,000,000. These were the liabilities of the old firm. That statement of account was carried into the general

ledger of the company, except that the two sides were reversed. Of the bills received by the company—about £9,000,000—£1,000,000 were in hand,* and the remainder were left in security for loans from the bankers. The shareholders' accountant added £7,000,000 for bills re-discounted; but these, he admitted, were only contingent liabilities, and might never take effect. Out of seventeen millions of bills (according to the shareholders' accountant), one million were in hand; seven millions had been re-discounted, and the remainder were transferred to the company as cash securities.

Taking the £15,000,000, on one side, representing liabilities,† and, on the other side, representing assets, the assets would not amount to £15,000,000 if the items entered as suspense and guarantee account were deducted. That account was carried into the books of the company thus. There was a separate account opened in the ledger, called the Suspense and Guarantee Account, and that sum was debited to it—£4,200,000. It appeared as a debt from Overend to the company. But it was at once credited with the sum of £1,000,000, the amount of the balances on the partners' private account, which reduced it to £3,200,000. That sum of £1,000,000 was transferred from the accounts of the partners, and the shareholders' accountant admitted that it was properly so transferred. It was, he said, a perfectly fair and legitimate transaction in that respect. Then the account was further reduced by the sum of £250,000, half the purchase-money, which reduced it to £2,900,000. Then there was a further credit for £173,000, proceeds of the shares, which were the other half of the consideration, and the price of the trade premises, £26,500, which together made a sum of nearly £200,000, and further reduced the amount of debt to £2,700,000. And then there was a sum of £500,000, pro-

* Thus there was a million of ready assets, exclusive of the £120,000 actual cash.

† That is, taking them as present liabilities, which they were not, several millions being for deposits at interest, subject to withdrawal, but also to renewal by fresh deposits, and so constituting rather floating capital than present liabilities. If the assets were not all ready, so neither were the liabilities all present.

ceeds of private estates, reducing the amount to £2,150,000 in round figures. That was, then, the position of the account. But, on the one hand, it was increased by further advances on the old accounts, and, on the other hand, by further credits; and at the time of the stoppage of the company it stood at the sum of £2,970,000. That is to say that, or about £3,000,000, was the total amount of deficiency on the account. As to these advances after the company started, however,

The Lord Chief-Justice observed that they appeared irrelevant to the present charge, of a fraudulent transaction as to the transfer.

Mr Kenealy urged that this was evidence of absence of *bona fides*. The issue was, Did the defendants conspire to sell an insolvent concern, or to obtain a large sum on the purchase of an insolvent concern? *

The Lord Chief-Justice said that it might be cogent evidence of fraud if the persons charged had disposed of a business known to be worthless; but the fact that the company, after the transfer, made bad debts by imprudent advances, appeared rather to prove folly in the conduct of the business than fraud in the transfer of it.

Mr Kenealy urged that, if the £4,000,000 stood in the books of the firm as their liability to the new company, and they induced the company to advance £600,000 more upon those accounts, that went to show *mala fides*.

The Lord Chief-Justice.—In that particular transaction. But how does it show *mala fides* in the transfer?

Mr Kenealy.—They kept the sum in their order books, debiting themselves with it in the new accounts.

The Lord Chief-Justice.—How much more advantageous would it have been for them to get rid of it altogether, and pass it off to the new company! They did not do that, but engaged to be responsible for it, and that is a striking feature in the case.

* Here it will be observed that the issue stated was quite unconnected with the truth of the prospectus; and, moreover, there was an ambiguity as to the imputed insolvency, whether it meant only a deficiency of *trade assets*.

Mr Kenealy.—They made advances on the old accounts to the old debtors, and the amounts are debited to Overend's suspense and guarantee account.

Sir J. Coleridge objected that there must be some foundation laid to show these advances fraudulent. No doubt, in the attempts to improve the account, and to wind-up these enormous concerns, advances were made by the company to the old firm in respect of those matters which they were winding-up, and on which they were charged with interest. There is no doubt about the fact. But if *fraud* is imputed, a foundation for it must be laid.

The Lord Chief-Justice said the bearing of the matter upon the case was extremely remote, no doubt.

Sir J. Coleridge objected to the evidence as inadmissible, because having no bearing whatever on the original transaction.

Sir J. Karlake also objected on the part of the new directors.

The Lord Chief-Justice.—They are seeking to show, not merely that the items were carried into the account, but that money was actually paid out of the funds of the company to the credit of the firm on this account.

Mr Mellish.—But the fact of that being in the account does not show it. All that it shows is that, under the suspense and guarantee account, the old firm were bound to guarantee it.

The evidence was, however, admitted, and in the result, it appeared that further advances had been made by that company on some of the old accounts to the amount of £600,000, and that thus the amount of deficiency on the account was £2,900,000. The effect of the bookkeeping was to render the old firm liable for the whole amount, and to charge interest upon it. The shareholders' accountant said this was wrong; but it appeared that the official liquidator had issued accounts showing a profit by the company during the nine months of its existence, *including* that interest.

With regard to the amount of business done by the company during the nine months of its existence, the official liquidator stated it at £56,000,000. That was the amount of the bills discounted, and there was a very large amount of first-rate paper turned over. It was, however, he said, an exceptional period. Money increased in value from the formation of the company up to the date of the suspension, when it was 7 or 8 per cent. Bills might be discounted one day at the bank rate of 3 per cent, which on the next day might be raised to $3\frac{1}{2}$ per cent, and if they were re-discounted it would be at the higher rate. Thus there would be little gain, or probably a loss. A large quantity of such business must be done by re-discounting. The profit is obtained by using other people's money at a low rate.* On the 27th July 1865 the rate of interest was $3\frac{1}{2}$ per cent. On the 20th May 1866 (the day of the stoppage) it was 8 per cent. The rate of money was steadily rising between these dates.

On the 27th July 1865 it was at $3\frac{1}{2}$ per cent.

3d August ...	4	"
28th August ...	$4\frac{1}{2}$	"
2d October ...	5	"
5th October ...	6	"
7th October ...	7	"
23d November ...	6	"
28th December ...	7	"
4th January 1866	8	"
22d February ...	7	"
15th March ...	6	"
3d May ...	7	"
10th May ...	8	"

and it went on to 9 per cent.

Speaking broadly, it went on steadily rising from July 1865 to May 1866. Consequently, he said, the company was brought out at the most unfavourable time as to the discount operations. And this great demand for money would also operate on the deposits. There was a large withdrawal of deposits from the bank in the first four months

* That is, having it at a low rate, and using it at a higher.

of the new company in 1866. The single deposits,—*i.e.*, the deposits by persons at interest, that is, on a certain number of days' notice—were, on the 1st August 1865, £2,260,000, and country bankers had on deposit £1,900,000, and the loans to the company on security were £9,000,000. On the 1st May 1866 the single deposits were £1,830,000, the country bankers £1,230,000, and the loans on securities £5,400,000. The amount of deposits withdrawn in the last four months of the existence of the company was at the rate of a million a month. Between those dates there was a difference against the company of nearly £5,000,000. That is, comparing withdrawals with deposits, they were £5,000,000 the worse. The firm were not bankers; they did not hold money on drawing accounts. The money of other persons deposited with the company was drawn out at that rate, thereby greatly diminishing the working power of the company. The difference between the 1st August, the day of their commencing, and the date of their suspension, was £5,000,000. That sum represents the amount the company was the worse for between those dates; that is, that £5,000,000 more were drawn out than was paid in. Of that amount, £4,000,000 were to be attributed to the last four months during which the concern was working—between the 1st January 1866 and the 1st May 1866 there was a difference of £4,000,000. The amount fluctuated. On the 27th January 1866 the single deposits amounted to £2,900,000, whereas on the 1st August they were only £2,200,000, and that up to January there was an increase. But between the 1st January and 10th May the single deposits were reduced from £2,900,000 to £1,800,000. Up to the 27th January things stood better than they did at the commencement of the company. But between the 27th January and the date of the stoppage things grew worse by £5,000,000, in respect of the money that had been drawn out. This money that was withdrawn was the same in fact as cash. It was the money upon which they were working. The great bulk of the

business was done with other people's money.* There was in truth, withdrawn £5,000,000 of earning profitable capital. Their profit would be upon the use of that money, the difference between what they could get as interest and what they paid as interest.

At the end of January it became known that Messrs Gurney were selling their property, and this increased the distrust. They had before the stoppage realised £600,000, and after the stoppage there had been realised above £700,000, and £60,000 more was expected. But the property had been sold under great depreciation. The million of doubtful assets estimated to be good had, from a similar cause, realised only about £600,000. Everything had been realised at a period of great depression. But the estimate originally made was fair and reasonable.

The official liquidator was asked whether the cause of the stoppage was not the want of power to realise the suspense account. He answered that he considered that, if the account had been realised, there would have been no suspension, upon which

The Lord Chief-Justice observed, that whenever there was a run, and the house stopped in consequence of the run, it was impossible to realise at the minute.

Mr Kenealy.—If the excepted accounts had not been locked up for three years and a half, there would have been no suspension.

The Lord Chief-Justice.—They were *not* locked up for that time, because it was impossible that such debts as these could be realised. The fact was, that insolvent companies or firms were the debtors. Dividends could only be got from time to time. Securities, which had to go through certain processes before they could be made available, so as to be realised, could not be taken into the market and made money while there was a run. The truth is, the cause of the stoppage was the insufficiency of

* From which it follows that it cannot be kept always ready for repayment; otherwise, what would become of the business? How could it be dealt with?

money on deposit to supply the money that was drawn out. If there had not been that run upon them, they might have been going on now.

The official liquidator replied that it was so.

The Lord Chief-Justice.—Because, as I understand it, the greater portion of the business was carried on with other people's money; and as long as other people will trust you with money, you can carry on business; but if those people withdraw their money, and you have not got money to back you, then you come to a stand-still.

The witness said it was so; it was a question of confidence.

The Lord Chief-Justice.—The withdrawal of deposits would affect the power of discounting, for withdrawal of deposits diminishes the means of discounting.

At the close of the examination of the official liquidator, he was asked by the Lord Chief-Justice whether, from all he had seen of the business and the accounts, he was of opinion that if the sum of £4,000,000 had been met by the private estates, and the bad assets got rid of, and fresh capital brought in to supply the deficiency—that if the crisis had not occurred in May 1866, the business would have been prosperous, and he answered that he was of that opinion, and that, if the business had been conducted as a bill-broking and money-dealing business, without any of its funds being applied to extraneous advances or adventures, there was nothing to prevent its being carried on as prosperously as before. That was his opinion, and he added that he believed that *if the old firm had gone on, it might have been in existence now*, for it was no worse off in 1865 than in 1864.

Some question was made as to the amount of withdrawals during the four months before the stoppage, but the official liquidator, by reference to the books, supported his statement. On the 13th of January 1866, and the 13th of April, the difference was £4,752,000. The amount at the first date was £14,191,000, and on the second £9,439,000,

the difference being £4,752,000. Upon this he was challenged to show in the general ledger any other items or heads of moneys drawn out than those of single deposits, loans on securities, and country banks (which only made up £2,900,000), and he said there were several other heads of items. There were a number of personal accounts not included in those others. There were 500 accounts with the house not perhaps included in single deposits, and on which (so far as he had been able to examine them) large amounts had been withdrawn during the period to which he had referred. And, on the whole, his statement appeared abundantly maintained.*

With regard to the condition of the company at the time of the stoppage, the official liquidators stated that the gross amount of liabilities was above £18,000,000, but then this included bills re-discounted—about £8,000,000—their liabilities on which were merely contingent, and might never take effect, or if they did, might be reduced to payments. In June the liquidators issued a report, entitled, Approximate Statement of the Affairs of the Company in Liquidation, May 1861, and the gross liabilities were there stated as nearly £11,000,000; that is to say, nearly £4,000,000 creditors unsecured, £6,000,000 creditors secured, and about £9,000,000 liabilities as bills payable,—all of which the (official liquidators stated) should be paid by the parties for whose account the bills were accepted. This was part of the liabilities on bills re-discounted, the gross amount of which was stated as about £8,000,000, with this note—"It is impossible at the present time to form any correct estimate as to the amount which may ultimately be claimed against the company in respect of those bills," as to which it is to be observed that the liability of the company was only contingent—i.e., contingent upon their non-payment by any of the prior parties to the bills. Then as to the assets, the liquidators stated—"No

* The importance attached to it might be inferred from the efforts made to destroy it. No point in the case was more obstinately controverted. And it should seem that it was felt to be fatal to the theory of the prosecution as to the cause of the disaster.

estimate having been made of the claims which will arise against the company in respect of bills re-discounted, the addition of the items would be useless, and might lead to erroneous impressions as to the ultimate result." But the estimated assets were stated to the gross account of between five and six millions, and an estimated account of between four and five millions. This included the cash in hand, nearly £64,000; the bills renewable, £1,150,000, estimated to realise £1,100,000; sundry debtors' balances, £460,000, estimated to produce £420,000; over-due bills in hand, nearly £1,000,000, estimated to produce £90,000; the suspense and guarantee account, £2,970,000, estimated to produce £2,250,000; surplus of creditors' securities, £270,000, and some smaller items, making a gross total, as above stated, of nearly £6,000,000, and a net total of between £4,000,000 and £5,000,000. Whether or not this would leave a surplus or a deficiency entirely depended (as the official liquidators now stated) upon whether the contingent liabilities of the company on bills re-discounted were met or not. If they were met, they would be assets; if not met, debits.

He explained that on these bills for which the company was liable there were the names of persons who were bound to pay them; and these bills, therefore, must be regarded as assets of a certain value—but *what* value would depend on the ultimate result. Depositors were creditors unsecured, but parties who had re-discounted bills or held bills as securities for advances were secured creditors. If the whole of the bills re-discounted were paid, there would be a balance in favour of the company, a balance of nearly a million. Of the amount of £6,000,000 secured debts, a large portion was covered by bills, and it was explained that on these there might be a surplus, as bankers did not always discount, but made advances on a mass of bills; so that the bills when redeemed would be assets. Then the official liquidator made this statement—

"The approximate statement of the affairs of the company in liquida-

tion has not been pursued without very considerable difficulty, for at the present time the most carefully considered estimates may prove fallacious. On the one side of the account there is the contingent liabilities arising from the borrowing on or re-discounting of bills still current, to the amount of nearly £14,000,000, while on the other side the probable result of the realisation of assets of the nominal value of £15,000,000 has to be dealt with. We do not propose, at the present moment, to attempt to estimate the loss which the company may ultimately sustain by the non-payment in full of the bills held by creditors as securities for loans, or of the bills re-discounted, for having regard to the large amount of such bills, and the very exceptional state of commercial affairs, no such estimate could be relied on."

The official liquidator explained that the gross total of £18,000,000 of liabilities was made up of £4,000,000 unsecured creditors, and £14,000,000 of contingent liabilities on bills either re-discounted or deposited as securities. The whole of the £14,000,000, he pointed out, might have been paid, and then there might have been a surplus of nearly £1,000,000—the other assets being estimated at about £5,000,000. The statement went on—

"With respect to the assets on the credit side of the account, we have, to the best of our ability, made such an estimate as we think fairly represents their value; at the same time, the peculiar nature of the greater portion, together with the circumstances under which they will have to be realised, precludes the possibility of our stating the actual amount which they will ultimately produce."

The estimated loss on the suspense and guarantee account was estimated at £2,168,000. There had been certain liabilities on guarantees given by the old firm, which were debited to that account in addition to the original amount. For some of these, securities had been taken, however, and, to a certain extent, realised, and the result was, that the deficiency on the account was reduced to the above amount. That is to say, the ultimate deficiency on the excepted accounts and assets was, in round numbers, £2,000,000, and the withdrawals of deposits during the four months preceding the stoppage of the company amounted to £5,000,000; that is, the company, at the time of the stoppage, was, as

the official liquidator stated, £5,000,000 the worse, as compared with its position when it started.

With regard to profit made by the company, it had discounted £56,000,000 of bills; but then, owing to the continued rise in the rate of interest, the profit, by way of discount, was diminished down to a very small amount—about £4000. The total profit was about £134,000;—including interest on the suspense and guarantee account, which the official liquidator thought rightly charged, but which, of course, was not realised. On the whole, therefore, there was abundant evidence, in the case for the prosecution, that the stoppage of the company was caused not by the deficiency on the old assets, but by the excess of withdrawals over deposits.

Certain evidence was given as to the circumstances under which the stoppage of the company took place, and the conduct and statement of the directors at the time.

Discounting went on to the day of stoppage. On the 23d February, the defendant (Birkbeck) wrote to a shareholder in these terms, after an interview—

“Shortly after I saw you last December, we considered the question of publishing a statement, but we found that by the Articles of Association this could not be done except at a general meeting of the shareholders. By the 29th clause of the Articles, it is directed that ‘the first general meeting shall be held at such time not being more than twelve months, nor less than ten months from the incorporation of the company’—viz., between the 14th of May and the 14th of July. This has been the sole reason for no report or balance-sheet having been published. No one can have been more annoyed at the rumours relative to the company than we have been. I can only assure you that the company have not lost anything, and that the business is going on as satisfactorily as we could desire. We quite agree with you in the necessity of great caution in the American trade.”

On the 14th April, he wrote thus—

“I can assure you that there is not the slightest ground for the report which you mention, that any of the directors, or any of us, have been selling a single share since I wrote you in February. Except as noticed in the *Times* of to-day by frauds of Pinto, Perez, & Co., the company

have not made a single bad debt. I still believe that when July comes, you will be perfectly satisfied with the accounts."

On the 17th April, the defendant (H. E. Gurney) wrote thus to a shareholder—

"In reply to your note of yesterday, I beg to inform you that we have no intention whatever of making a call. None of the shares allotted to the late firm have been sold since October. Any loss made by the Mill-wall Company belongs to the old firm; till Pinto & Co. let us in, we had not made a single bad debt. I am sorry to say that they, by fraud, have let us in to a considerable extent, but how much it will be, we cannot at present tell; but I have no fear of our being prevented paying a fair dividend. As to a public statement, we believe that is better avoided till the right time comes for our meeting."

A shareholder was then examined as to a conversation with Mr Birkbeck on the 10th of May 1866, the day of the stoppage, when Mr Birkbeck said that a day or two before, the directors had met, and agreed to divide a profit of seven per cent.; but that the day before, the Bank of England had *summarily rejected a large class of securities*; that there was an old grudge between the bank and the Gurneys, and that they had taken the opportunity of stopping them. He said the Bank of England had refused an advance upon ample and abundant security, and that the conduct of the bank ought to be the subject of inquiry in Parliament; and that it would produce such a crash as would reverberate throughout the kingdom. Witness asked him as to the prospects of liquidation, and Mr Birkbeck said that he and Mr H. E. Gurney had gone carefully over the securities, and believed that £7, 10s. per share would be realised, though there might be a call required for the winding-up. Mr Birkbeck, on that occasion, said to witness, knowing him to be a large shareholder, "I wish you would abuse me."

In cross-examination, it was elicited that the witness was plaintiff in a suit in Chancery to render the defendants personally liable. Mr Birkbeck had told him that he had quite lately invested some money of his wife's in the concern. And this was proved as a fact in the case.

It was also proved that another defendant (Mr Barclay) had recently lodged £90,000 in the house as a deposit.

On the 17th May, several days after the stoppage, the defendant Mr H. E. Gurney wrote—

" You will see by the papers that a meeting has been convened by some of the shareholders, to see what means can be taken to resuscitate this fine business ; but it is clear the best way will be not to make a call and continue the old concern, but start off an entirely fresh one, which must do a large business, and giving the shareholders the opportunity of taking shares."

With regard to what occurred after the stoppage, and especially as to the condition of the company at that time, the following evidence was given.

Messrs Turquand and Harding were appointed official liquidators. In the meantime a meeting of the shareholders and directors took place on the 11th of June 1866. The prosecutor was present at a meeting of the shareholders. Mr J. H. Gurney was in the chair, and stated that all the directors were present. Mr J. H. Gurney alluded to the failure in the value of the assets, and witness asked whether the directors had taken any pains to investigate the value of the assets before they were taken. No answer was given. He repeated his question, and then Mr Rennie gave an answer, and stated that they had investigated the value of the assets, and that he and his friends, the other directors, had investigated the value of the assets, and that there was a deficit of about £1,400,000, and that, without investigating the value of the private estates, he and his colleagues had assumed that they must be worth at least that amount. Witness asked whether the private estates were to be only responsible for that amount, or for any deficiency that might arise. The answer was, that they were liable to an unlimited extent. Mr Rennie stated that what the firm wanted at the time of the transfer was " fresh capital ;" and he stated, as a proof of the good faith of the directors, that at the time of the collapse every one of the directors was a large shareholder and a large

depositor. The great point was as to the private estates, and at that time he had no bad opinion of any of the parties. A committee of investigation was then formed to look into the affairs of the company, and the prosecutor became the chairman.

At the close of the case, in consequence of some cross-examination of the prosecutor as to the proceedings in Chancery being put in,*

Mr Kenealy proposed to put in the affidavits and affirmations of the defendants in those proceedings.

Sir J. Coleridge submitted that the whole should be put in.

Mr Mellish submitted that, before depositions could be put in, it must appear on what proceedings they took place. The affidavits were, on the application of a shareholder, to be struck off the list of contributories.

Mr Giffard said there were two Chancery suits, in which

* There were, first, proceedings by shareholders to be taken off the list of contributories on the ground of fraud on the part of the directors; and these proceedings were dismissed on the ground that fraud, as between the directors and the shareholders, was no answer to the claims of creditors. The case went on appeal to the House of Lords, who affirmed the decision. (*Oates v. Turquand*, 3 Law Reports, H. L., 328.) Then there was a bill by some of the shareholders, on the part of the company, against the directors on the ground of fraud, stating that, at the time of the transfer, the firm were insolvent to the extent of at least \$1,000,000; that the directors were aware of it; that the second deed was not mentioned in the prospectus, and was not made known to the shareholders, and that, if it had been disclosed, and the true state of the firm had been made known to the company, they would have refused to purchase the good-will; that the liabilities exceeded the assets by above \$3,000,000; and that, to meet the deficiency the directors secured only such sums as might be recoverable in respect of the assets, and such further sums as under the deed might be recovered from the partners; and that the directors had not enforced their guarantee. To the bill stating these matters there was a demurrer by one defendant, on the ground that they disclosed no sufficient claim for equitable relief. The Vice-Chancellor held that there was, but the Lord Chancellor annulled his decision, and held that there was not. This, of course, put an end to the suit; but, in the meantime, other of the defendants had put in answers, and, among others, Mr Rennie, whose answer was to the effect of his statement at the Mansion-House already mentioned. (*Vide ante*, p. 80.) The Lord Chancellor, in his judgment, said that he quite adopted the opinion of the Vice-Chancellor in this respect, "that there is no charge that the directors' conduct, in making the purchase of the business, was fraudulent, or that they intended to do otherwise than discharge that which they thought their duty to the shareholders." The question was only as to breach of duty, no fraud being pretended; and as to that the Lord Chancellor held that there had been no such breach of duty. "The directors," he said, "were, according to the Articles of Association, to make a purchase of an extremely speculative nature. Every one knows that the trade of a bill-broker is very speculative. The company, therefore, was to embark in that which must always be a hazardous business—a business entirely dependent on the prudence and dexterity of those who manage it. Then the scheme was this:—The partners in the old firm said, We are in a state of insolvency to the extent of two millions

some of the defendants had filed answers, which he desired to be put in.

Sir J. Karslake made a similar objection.

The Lord Chief-Justice.—Strictly speaking, the affidavits could only be used against the parties making them. If the prosecutor desires to put them in as part of his case, the *whole* of the proceedings ought to be put in. A single affidavit may bear a very different interpretation from what it ought to bear, if read in connexion with the other proceedings.

Upon this, none of the proceedings were put in on the part of the prosecution.

There was no evidence for the defence.

but we have four millions owing to us, and we want time to get these four millions in. We will set off our one million, which is due to us as partners, against these debts; we will also leave £250,000, part of the sum to be paid for good-will, as entering into that account, and so far reducing the amount we are ultimately to pay you. The time given for realisation is to be three years and a half, which is called the suspense period, and during that time we will try to get in those four millions; we will get in as much as we can, and we will guarantee you the difference at the end of the time. No doubt, to one not accustomed to be engaged in hazardous transactions of this kind, this does seem to be a most hazardous speculation; but I must take it, that those who entered into this concern, having power to buy the business upon the best terms they could make, and having power to take a guarantee, which implied that they might possibly have had a necessity for a guarantee in respect of the liabilities, they entered into this arrangement, and they bought a business which has not turned out quite so profitably as they expected. However, it was evidently a speculation, because it would be absurd to suppose that the whole of the four millions could be realised. And how are we to tell what portion was expected to be realised? How, then, can it be said that there was a breach of trust on the part of any one of the directors towards those who employed him as their agent? They employed him to buy this concern, believing it to be, though a hazardous one, yet a flourishing one; and the view which I take is, that they bought it, believing it to be a flourishing concern. There is nothing to show that in taking the guarantee the directors were guilty of any breach of duty. The partners were all thought to be men of wealth, and there is nothing to show that they were not, in truth, so—subject, of course, to this question of the two millions, which, if the firm had broken up at that moment, might have been demanded of them. The company must take the consequences of having intrusted their money to persons of sanguine temperament, who have made a purchase which turns out to be a bad one; but I do not find enough in the case to show me that it is so ridiculous and absurd, or that there has been such *crasis neque mentis* amounting to fraud, as to induce me to hold that there has been any breach of trust." The Lord Chancellor went on to say, as to the remark that the directors were not justified in keeping back the second deed, that this might or might not justify a particular creditor in saying he had been misled; but he doubted whether an averment that, if that deed had been produced, many would not have subscribed, was an averment of any matter of fact at all. The case, however, as to the conduct of the directors in the transfer of the business turned on the Articles of Association, which gave them the power and contained the terms of the contract between the company and the directors. (*Overend & Co., Gurney and others, Law Reports, Chancery Appeals, 721, 39 L. J., Ch.*) The Lord Chancellor therefore dismissed the bill; and if the whole proceedings had been put in, his decree and the answers of the defendants would have been put in.

With reference to the suit in Chancery, it was mentioned that some of the defendants had answered, and one of them had made a statement to the same effect.

The Lord Chief-Justice more than once observed that it would have been but fair that the statement thus made by one of the defendants should have been presented by the prosecutors either—if there was no reason to doubt it—as his defence, or—if it could be falsified—as part of the evidence for the prosecution.

It was not, however, put in. It was proved that the defendants had relinquished all their private estates for the benefit of the creditors.

It appeared that shortly before the stoppage the Norwich Bank (mentioned in the estimate of assets) was so dealt with as to become “locked up” during the “suspense period.”

The above appears to have been the substance of the evidence so far as it was really material.*

The case for the prosecution, as already mentioned, turned mainly on the alleged insolvency, by reason of the four millions of bad or doubtful assets, which, it will be observed, were, according to the evidence of the official liquidator, rightly estimated as worth £1,000,000, so that the deficiency was thus reduced to £3,000,000, and was, according to the admission on the part of the prosecution, rightly reduced by another million, the amount of the partners' private balances, so that the deficiency was thus reduced to £2,000,000. And, according to the evidence of the official liquidator, the real value of the partners' private estates was equal to that amount; so that, according to the case for the prosecution, at the time of the transfer of the business there was no insolvency, in the sense of a deficiency, in the total assets, private and partnership, of the members of the firm.

It was indeed stated by the shareholders' accountant

* There were many minor or collateral matters in the evidence, not necessary to be noticed, especially as they were fully dealt with in the summing up. The object in the Report has been to state clearly the *material facts*.

that interest was improperly charged on these bad or doubtful debts, and, in particular, that the alleged profits made by the company was, for the most part, made up of interest so charged, but the official liquidator thought that, under the guarantee, interest was rightly charged against the guarantors, the vendors. On the other hand, as to the books of the firm, the shareholders' accountant admitted that interest might fairly be charged upon debts until hopelessly bad—that is, until after bankruptcy. Until then, he said, interest might properly be charged on profit and loss account.

With regard to the accounts of the old firm, the official liquidator said that the books were kept in the usual way in which bankers kept them, and that the profit and loss account was properly kept. There was an abstract of balances in the ledger, which showed the profit and loss to any one acquainted with the business. There were balances owing by the firm, and balances owing to the firm. The one, they could have no doubt, would be paid; the other would be a subject of value. It would require special knowledge as to that upon this head of the case.

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is kept
The Lord Chief-Justice observed that the firm appeared to have ~~left~~ ^{kept} accounts which they had always been in the habit of keeping. Besides, *the shareholders took their shares without asking to see the accounts at all.**

With respect to the profit stated as made by the company, and which was partly made up of interest charged against the vendors or their guarantee, the shareholders' accountant stated that he did not mean to represent that the charging of interest on the profit and loss account was wrong; but that the making it out a *profit* was wrong. It was, however, elicited from him that the account published was a copy of the profit and loss account, which represented it truly as interest on the suspense and guarantee account. And it was also elicited that the account thus objected to *had been put forth by the official liquidators.*

* This was the key to the fallacy which pervaded the whole case for the prosecution.

It was attempted, in one instance, to prove part of the doubtful debts *fictitious*, or pretended, and not really due; but the attempt failed, and the witness proved that the money was really due, though from another party, and, as a mere matter of bookkeeping, it was debited to himself, as the agent. It was attempted to throw some discredit on one of the books, but that also failed, as did evidence of motive. These were the only attempts to prove any actual deception or fraud, and they failed.

It appeared, as already stated, that the estimates of the value of the assets and of the private estates had failed, but there was no evidence that the estimates were not honest and fair, and the official liquidator proved that they were *reasonable*. And he explained and accounted for their failure by reason of the depression under which these assets and estates were realised.

Had these assets and estates been realised, as they would otherwise have been, there would have been no deficiency on the assets of the old firm.

According to the evidence of the official liquidator, the deficiency, after the failure of the company, was about £2,100,000, though the prosecutor sought to make it out to be £2,900,000.

And, as already stated, according to the evidence of the official liquidator, there were £5,000,000 of deposits withdrawn within the last five months of the existence of the company—that is, £5,000,000 in excess of withdrawals over deposits. Down to the time of the stoppage, the company, however, had capital to discount with, and, within the last ten days, discounted £800,000.*

Mr Mellish then submitted, on the part of Mr Barclay,

* In the course of the trial, which lasted several days, the shareholders' accountant published a letter in one of the papers, commenting on his cross-examination by the Solicitor-General, who complained of it, in court; and thereupon the Lord Chief-Justice at once animadverted upon it as a gross contempt of court, for which he declared, unless the witness at once apologised, he should commit him for contempt of court. A witness, he said, upon whom observations had been made might have a right after the trial to vindicate himself, but not by an appeal to the public while the trial was proceeding, and while the case was still under the consideration of the jury. The witness thereupon explained and apologised.

that there was no case against him. He first referred particularly to the indictment. The first set of counts, he pointed out, did not charge a conspiracy, but were framed upon the recent Act, (24 & 25 Vict., cap. 96), which enacted that directors putting forth false and fraudulent statements, with intent to deceive and defraud, should be deemed guilty of a misdemeanour. These counts, he said, charged the making and putting forth of the *prospectus*, knowing it to be false. Then there was another set of counts (7 to 17), charging a conspiracy to commit the statutable offence. Every one of these counts treated the issuing of the *prospectus* as an overt act of the conspiracy. Then there was a set of counts (18 to 30), charging a conspiracy to cheat and defraud particular persons. These counts did not appear to have been relied on, and they did not specify the false pretences relied upon. The essence of these counts was an intention to defraud particular persons, and he apprehended that they failed.

The Lord Chief-Justice.—Not necessarily so, assuming the conspiracy; it would be a continuing conspiracy until it eventuated in the result of fraud upon individuals.

Mr Mellish.—The only device charged is the issuing of the *prospectus*.

The Lord Chief-Justice.—But if the issuing of the *prospectus* was an overt act of a previous conspiracy to get rid of a worthless concern and induce the public to take it, it is not the issuing of the *prospectus*, but the conspiracy of which it was the means, which would be the offence. If the conspiracy should be established—if the jury should see evidence from which they may infer the existence of the conspiracy, then it does not depend merely upon the issuing of the *prospectus*; and if they all joined in the conspiracy, and then resolved to publish the *prospectus*, then, although one of the parties had no hand in it, yet it would be evidence of an antecedent conspiracy, and whatever was done within the scope of and for the further-

ance of the common purpose might be taken to be done by all who concurred in the common purpose.

Mr Mellish.—But on counts for a conspiracy, and counts so general, it is important to distinguish what is sufficient evidence to prove that any individual was a party to it. And there is no evidence of a conspiracy to which Mr Barclay was party.

The Lord Chief-Justice.—It is put thus—that all of them were aware that the business was worthless, and that they all combined to get rid of it in this way.

Mr Mellish submitted that there was no evidence that Mr Barclay had anything to do with the prospectus.

The Lord Chief-Justice.—Not unless he is connected with a general conspiracy which was carried out by the prospectus.

Mr Mellish.—There is no evidence that he knew the state of the affairs of the old firm until after he became a director, and the letters show that he was not an original director, and that the prospectus was settled and the company substantially formed before he became a director. He signed the memorandum of association on the 23d of July, the day the company was formed. The prospectus was issued on the 13th of July, ten days previously, and it was issued by the original promoters. Mr Barclay was not a promoter, and only agreed to become a director after the company was formed.

The Lord Chief-Justice observed that the company was legally formed, but not really or actually.

Mr Mellish reminded the Lord Chief-Justice of the case of Sir E. Watkin, who saw his name for the first time to a prospectus in *The Times*, and objected to it as “too floric;” and although he remained a director, yet the case as against him was stopped. That showed that a director becoming so after the company was established was not liable for any fraud in the concoction of the company.

The Lord Chief-Justice.—The weakness of your argument is, that it is not the mere formation of the com-

pany which is here charged, but the offering of shares known to be worthless. The substance of the case is, that the directors offered shares to the public knowing that the scheme was worthless. That is how it is put, and it is impossible to assume that a party who becomes the director of a company constituted to carry out a certain scheme, if it is fraudulent, cannot be presumed *prima facie* to be cognisant of the fraud. If it should be proved that Mr Barclay knew nothing of the affairs of the firm, it would be different.

Mr Mellish.—My Lord, my client, Mr Barclay, does not desire to throw the slightest imputation upon the Messrs Gurney of having defrauded him. He would rather be convicted than cast such a reflection upon them. But at the same time, when it comes to a question of evidence against himself of fraud, surely he may fairly urge that there is no evidence that he knew the affairs of the company?

The Lord Chief-Justice.—Of course, if it shall turn out in point of fact that Mr Barclay, when he consented to become a director, knew nothing of the concomitant facts, the jury will be bound to dismiss the case as against him. But I cannot assume it. It is a question for the jury; it is impossible for me to determine it.

Mr Mellish, upon that, desired his Lordship to reserve the question whether there was any evidence against Mr Barclay.

The Lord Chief-Justice assented.

Mr Kenealy then addressed the jury upon the evidence for the prosecution. Notwithstanding, he said, the magnitude of the case, and the high position of the defendants, the same principles of law were to be applied as in the most miserable case at Quarter Sessions. For his own part, he thought the case resembled one of a mock auction, where silver was sold which was not silver, and jewels which were glass.* The defendants were mock auctioneers,

* If property is sold at an auction under a description which is untrue, and calculated to entrap, the sale is void, and the purchaser may recover back his deposits (Robinson

who sold as valuable what they knew to be worthless, and thus induced persons to part with their money. He desired to keep the jury to the real point in the case. He was not going to encumber the case with figures; he put this broad question, Was the concern sold known to be insolvent when it was sold as solvent? * If the jury could not doubt that the defendants well knew the state of the concern, then the case was made out against them. † Moreover, *suppressio veri* was as bad as *suggestio falsi*. The suppression of the truth might be as mischievous as the statement or suggestion of falsehood, and the concealment of the second deed was ample proof of fraud. Again, one of the defendants, in writing to another, said, "You are right in negating the proposal of continuing the business of Overend, Gurney, & Co." Such a proposal had been made and negated, a proposal to continue the old business. It was known to be an untenable proposal. It was to be lamented that they had not also abandoned the idea of continuing the business by means of a new company. Another letter spoke of a deficiency, yet their solicitor spoke of a "surplus."

The Lord Chief-Justice.—That was not after selling all their estates.

Mr Kenealy.—They did not contemplate that then.

The Lord Chief-Justice.—Yes, if required, it was provided for. You must take the whole arrangement. If the

v. Musgrove, 8 C. & P. 469). And a sale announced to be without reserve is void if puffers are employed to bid (Thornett v. Haines, 15 M. & W., 307); and this is a conspiracy for which they may be indicted (Levi v. Levi, 6 C. & P.) But to constitute fraud, the representations made by the party must be *false to his knowledge*; and it is not enough to show that he stated evasively the means he possessed, but the jury must be satisfied, before they affix to a party the stigma of fraud, that he stated what was untrue to his knowledge (Tindal, C.-J.; Neeley v. Lock, *Ibid.*, 527). Fraud is a false statement knowingly made, for the purpose of inducing another to enter into a contract (Murray v. Mann, 2 Exch. Rep., 538).

* Not including the private assets, *vide ante*.

† This has never been held as law, except where the suppression was incident to and part of some positive misrepresentation; as where it was said: "If a man professing to answer a question select those facts only which are likely to give credit, and keep back the rest" (Foster v. Charles, 6 Bing., 403). Here, it will be observed, the suppression is described as part of a fraudulent misrepresentation. In that sense only has it ever been said that suppression may be as much fraudulent as assertion, when the suppression makes the answer or the statement fraudulent; and no case has ever arisen of an action for mere concealment, except as incident to, and part of a positive misrepresentation.

doubtful assets were not realised to a greater extent than the million estimated, they would be responsible on their guarantee for the residue. Mr Harding, the official liquidator, found among the papers an estimate of the value of the private estates. It never was supposed there was a surplus independent of the private estates.

Mr Kenealy said he did not suppose that this was so. On the contrary, he insisted that the members of the old firm well knew that their concern was in a hopeless state. Mr Gurney, in one of his letters, spoke of "a real" catastrophe. This showed that their position was well known, and that it was not solvent—that a catastrophe was impending over them, and he contended that it sufficed fully to support the issue. Then they ought not to have sold this business as they did. What was the real position of the company? It was represented that in 1858, and 1859, and 1860, the firm divided large profits. The greater their recklessness, considering their losses.

The Lord Chief-Justice.—The official liquidator stated that the losses did not commence until afterwards. That is the evidence; and in a criminal prosecution we must go according to the evidence, and only according to the evidence. The official liquidator gave that evidence, and if it was not correct, it was open to you to contest and contradict it; but you did not attempt to do so, and, that being so, it must now be taken to be the fact.

Mr Kenealy said he submitted to this correction, but contended that the defendants could never have supposed that the tremendous deficiency of £4,000,000 could ever be realised. He desired the jury to decide the case according to the actual facts, and not upon fallacious estimates. He insisted that the directors must have known that they were insolvent at the end of 1865, even allowing for all available assets as being realised. They ought not to have shut their eyes to the real facts. They had for fifteen years been losing largely.

The Lord Chief-Justice.—No, that is not so; I really

cannot allow you to say that. It is not in accordance with the evidence. It is not true that they had been losing for fifteen years, but only for five, and that it was far from being true that the whole were available assets, and there certainly was a large deficiency.

He urged that the estimates of Mr Harding, the official liquidator, were fallacious. The estimate of assets was entirely fallacious. The Millwall Ironworks debt and others had been released, or were worthless, instead of being reduced. These were instances to show the utterly unreliable nature of the suspense and guarantee account. What was the use of putting down such assets as these as amounting to £4,000,000?

The Lord Chief-Justice observed that they were only estimated to amount to £1,000,000, and the old firm gave their guarantee for the deficiency.

Mr Kenealy went on to urge that there was an ultimate deficiency of nearly £3,000,000. These were the circumstances under which the jury had to determine whether any or all of the defendants had been guilty of this conspiracy. It would not do for any of the defendants to say that they did not know the real truth. It was for them to inquire into and find out the truth.

The Lord Chief-Justice.—That is not so; on a criminal charge the question is what they really knew or believed to have been the truth. If, upon such a charge as this, it appears that they had an honest belief in what they represented, even though contrary to the actual facts as they turned out to be, then the charge cannot be sustained.

Mr Kenealy said that, taking this view of the law, he relied on the fact that the firm for several years had ceased to divide any profits, and that the estimate of assets had been wholly fallacious. Nevertheless, they resolved to go on and transfer it to the shareholders, and with that view they issued their prospectus. If the defendants really believed the statement in it, they ought to be acquitted; if they did not, they ought to be convicted. It was true the

prospectus mentioned a guarantee of deficiency, but would it be supposed that the guarantors were insolvent? The 58th clause of the Articles of Association spoke of net profits and 7 per cent., but could they have believed anything of the kind? It was for the jury to say whether these representations were really honestly held out and believed in by the defendants. It was said that the shareholders did not look to any deed, and relied only on the general reputation of the firm. But if they had seen the second deed, and had known the list of doubtful debts,* they would not have been likely to take shares. The learned counsel then went on to comment upon the letters and the language of Mr Birkbeck to Mr Peek at the time of the stoppage—"I wish you would abuse me; it would be a relief." That showed a wounded conscience. Mr Peek's reply was suggestive—"If the transaction has been honest, why should you be abused?" No reply was made. The jury might be left to draw their own inferences. Adverting to the defence, he likened it to the customary defence in cases of embezzlement, which consisted in enveloping the case in clouds of figures. He noticed the alleged absence of regular balance-sheets, and dwelt upon it as indicative of suspicion. The broad fact was, that the company started with a deficiency of £2,900,000, and that the shareholders lost £3,270,000.† The defence was rested mainly on the estimates of Mr Harding, the official liquidator. On one side there were facts, on the other side mere estimates. What was the use of estimates against terrible facts? When the company started, the old firm owed them £2,970,000, and they made no profit beyond £4000.

The Lord Chief-Justice observed that this was not credible. They had discounted bills to the amount of £56,000,000, and they must have made an enormous amount by the discount. The official liquidator stated that the profit was £142,000, but there had been a deduc-

* They would not have known, for there was no enumeration of debts.

† The whole fallacy of the prosecution lay in coupling together these facts, as if they were in the connexion of cause and effect.

tion of £138,000 for interest, owing to the rise in the rate of interest on re-discounting.

Mr Kenealy proceeded to comment upon the deeds. The first, he said, was complete in itself, and did not refer to the other. If the transaction was honest, the transfer was the most simple matter in the world. If it was dishonest, of course it would be different. Then, indeed, there would be difficulty. If the concern was insolvent, then there would be a necessity for all the complex arrangements of the second deed; and no doubt it was this which rendered them necessary. Only one deed was mentioned in the prospectus, though there were intended to be two. Why was that? Why should the issuing of the prospectus have been hurried? It was brought out at a most favourable time. The number of shares applied for was 224,485, three times the number which could be allotted. And money was cheap at the time the company started, though it rose afterwards. There was, therefore, no reason for haste. And why was the second deed not waited for and disclosed? But how was it that, when it was known that there were two deeds, the prospectus was allowed to state that there was one? It was true that it did not state that there was only one. But why was not the other disclosed? The whole of the defendants consented to its suppression, and from that fact alone the jury might infer—not, indeed, that the new directors had the same knowledge of the affairs of the firm as the old members—but that they must have had some guilty knowledge. And it was not necessary to bring home the same degree of guilty knowledge to all of the defendants in a case of conspiracy. And if any of them had any guilty knowledge they were equally liable. Notwithstanding this, even a few weeks before the failure, the directors had talked about dividends. Could they really have believed in the possibility of any dividend? They talked of “resuscitating this fine business.” Could this hope have been sincerely entertained? Mere tyros in business might have been so deceived, but surely such

experienced men of business could hardly have been so. He contended that every one who was cognisant of the second deed was party to the conspiracy, provided the jury thought the second deed fraudulent. Of course, if the jury thought that deed fair and *bonâ fide*, there was an end of that view. But if they thought the second deed fraudulent, then all the defendants were aware of it, and were liable. He contended that the second deed was fraudulent, because it put off the realisation of the excepted assets for three years and a half. Another proof of *mala fides* was, he urged, the transfer of the Norwich Bank. But for that transfer, the bank would have been liable to the new company. And to that deed all the defendants were parties. The bank, but for the deed, would have been part of the assets of the new company, and it was locked up by the deed for three years. Nothing would be realised from the bank until 1870. This deed and the third deed made Mr Barclay liable. Mr Gordon was liable, for he had originally drawn the prospectus, which stated that the concern could not fail to realise a considerable profit, and that the deficiency would be amply and satisfactorily guaranteed. In conclusion, he contended that the defendants were all liable, chiefly because they had concurred in representing the concern as solvent when they knew it was insolvent, and because they had represented their guarantee as valuable when it was not so. He said,—I charge fraud against the defendants in these respects and in these particulars. I charge a promise not to call for more than £15 a share, thereby leading to the inference that the property was valuable, whereas double the £15 was absolutely sunk before they started; a promise of a guarantee for principal and interest, which in their insolvent condition they knew to be worthless. They were expected, we are told, to realise £1,000,000. Where was the greater part of the difference to come from except from the public? They had no large pecuniary interest, as alleged in their prospectus, all they had being swallowed up and the shares

at once appropriated to other purposes. They impliedly declared the good-will to be worth £500,000, when they well knew that it was worth nothing. They knew the business could not insure a highly remunerative return, as promised in the prospectus. A private firm might recover itself, but a public company which required a half-yearly dividend never could. The first would make a sacrifice, but the public company would require a dividend to keep up its shares, otherwise it must perish. They pretended that they had resolved to devote themselves to business of a first-class character, they having in reality resolved to convert the funds of the shareholders to the improper maintenance of the old excepted and insolvent account, on which they expended no less than £615,000. They deceived the shareholders, the Stock Exchange, and the public into the belief that there was only one deed which contained all the terms of the transfer. They knew that the Stock Exchange required all documents relating to such matters, yet on the 12th of August they sent "the original deed," which had been executed on the 27th of July. Was not the second deed an original also? They executed a secret deed against good faith and for the purpose of converting the property of the shareholders to purposes adverse to their own interests, and with intent to defraud. A false pretence in the 58th Article of Association, that the limited company would realise a profit of 7 per cent. on the paid-up capital, when they knew that all the paid-up capital would be absorbed in the liabilities of the suspense account. They pretended that the sum of £500,000 was to be retained in the hands of the limited company as a material guarantee, when they had already determined that it was to be otherwise expended against their own debts. The same false pretence and fraud as to the money, £26,000, paid for the premises. They pretended to transfer £15,000,000 worth of available and valuable assets against the same amount of immediate liabilities, when, in fact, they transferred only

£11,000,000 or £11,500,000 worth, thereby defrauding the shareholders of more than three millions. They combined to keep the shareholders in ignorance of what really was transferred and what was withheld in the suspense and guarantee account for the purposes of fraud. They guaranteed debts as good which they knew to be bad and wholly irrecoverable. They deceived the shareholders by wilfully withholding from them any real information as to the amount available for securities for the excepted accounts. Though they knew the excepted accounts to be worth only a small part of the £4,000,000 which they represented, they secretly agreed that they should be treated as being of the full value of cash ready to be paid down on demand, or, at all events, within a short and reasonable period. There was a secret and fraudulent agreement that Overend, Gurney, & Co. should be at liberty to put against the excepted accounts any moneys they received, even although they never paid them over to the limited company, but put them into their own pockets. A fraudulent agreement that the limited company was to lend money to Overend, Gurney, & Co. to wind up and close the excepted accounts (described as assets), though Overend, Gurney, & Co. had guaranteed the same. A fraudulent misappropriation of £615,000 under that clause. A fraudulent agreement to extend the time for payment of the suspense account to a period of three years and five months, as well as of their own personal liability, and which agreement they combined to keep secret from the shareholders. A concealment from the shareholders of the duration in point of time of the suspense period (three years and a half), which they were bound in honour to make known, the shareholders having an absolute right to knowledge of the fact. A pretence to sell and carry on the business of money-dealers and bill-brokers only after they had secretly agreed to take an interest and carry on the other old and ruinous transactions, speculations amounting to £4,200,000.

Sir John Coleridge (Solicitor-General) then addressed the jury on behalf of the Messrs Gurney and Mr Birkbeck. They, he said, heartily rejoice that at last an authentic and judicial opinion is to be pronounced upon their case. Of unauthentic, of ignorant, of cruel and unfounded opinion they have had enough, and to spare! They have had to live for the last two years in an atmosphere of calumny and misrepresentation, and so untiring have been the efforts of their assailants that there is scarcely a single fact connected with the case which is not now seen through mists and clouds of prejudice, enough to disturb the sight and distract the judgment of the calmest and justest men on earth. They know too well what is the effect, upon all men, of calumny, if it be but loud enough and long enough; and no one can say that the calumny in this case has been wanting either in loudness or in length. And the case has been opened in a vein of fierce invective and extravagant denunciation, which, in my experience, has been without a parallel. It has been termed a gigantic case of fraud, and likened to the South-Sea Bubble—a case as unlike the present as any case that could possibly be suggested in the whole range of our history. And a definition of conspiracy was cited from the summing-up of Lord Ellenborough in the case of Lord Cochrane,—a case in which a verdict was obtained, by clamour and by prejudice, which was not warranted by the evidence,—a case in which the verdict which that powerful judge obtained from an exhausted jury has been reversed by the universal—or almost universal—opinion of his countrymen! Such was the case which has been appealed to as a precedent,—a case surely more to be regarded as a warning than as an example.

If this were indeed a public prosecution,—if the counsel for the prosecution were indeed the high priest of justice conducting a temperate and judicial investigation into the crimes of great criminals, no one more than myself would more earnestly desire (if I thought that there was any ground for it) success to attend upon such an investigation.

But you will see that, as far as regards public spirit, or as for justice, or any desire to obtain the truth, you may measure it by the manner in which the prosecution has been conducted.

What is the object of the prosecution? To bring down upon the Messrs Gurney their ruin for life? They are ruined already. To get back anything they have kept back from the public? It is all gone. You know—it has been proved in the case—that every shilling which they had has been taken from them. Their life interests, their reversion, their estates, have all gone—not unjustly—to pay the debts they were bound to pay. And how have the defendants been treated? The prosecutor began by going into Chancery, for the purpose of making them answerable for the great sums of money lost. In the Court of Chancery there is the power—if affidavits are made—of cross-examining the persons who make them. The defendants are sued in Chancery, where, under a penal Act of Parliament, they were compelled to disclose all that they had done; and then, all the materials having thus been extracted from them, they were then subjected to criminal prosecutions; and it is sought to make them out criminals upon evidence which the law has allowed to be extorted from them in the course of these civil proceedings.

The first six counts of this voluminous indictment are framed upon this very Act of Parliament, which gives the plaintiffs power to cross-examine the parties, and compels them to disclose; and the very same clause which gives that power, protects those who make disclosure from any possible penal consequences of what they are thus compelled to disclose. It may be that, upon those counts of the indictment (which really contain the charge against the defendants), the very Act of Parliament under which the prosecutors procured their evidence would be a complete answer, because that very statute says fairly enough that though the party shall be compelled to make disclosures, yet, that to prevent the gross injustice of putting a man

upon his trial on matters which he was compelled to disclose, the statute says that it shall not be given in evidence; and that no one shall be convicted in consequence of disclosures which he has thus been compelled to make.

What are we trying here? We are really trying whether the Messrs Gurney and the other defendants were or were not guilty of the crime of issuing a prospectus wilfully false—one of the very heads of crime pointed out in this Act of Parliament, under which they procured their evidence, and then proceeded to indict the defendants in defence of their very enactment.

But the defendants, whatever that point of law is worth, decline to take it, and prefer to make their defence upon the merits.

You are here to consider, however, not merely whether the defendants have been guilty of issuing a false prospectus—for the whole stress of the case is laid upon the other part of the indictment, which charges the defendants with a conspiracy to do that for the mere doing of which they could not be indicted. And no doubt, in point of law, the prosecution may be so framed. But the question is, whether—when you look at the case, not through the fallacious figures of the accountant, but through the truth and fact as it will appear upon the evidence—you can find the smallest ground for saying that the defendants met together with the nefarious purpose of issuing a false prospectus which was to ruin all persons who were induced to take shares upon the strength of it?

Now let me direct your attention to the prospectus. It is suggested that it is fraudulent because they could not have thought that the money-dealing and bill-broking business of Gurneys was worth £500,000. It is not that they are charged merely with a careless and negligent statement, but that it was a statement wilfully fraudulent, with the criminal intention to deceive.

Then it is suggested that it was a fraudulent statement that the vendors guaranteed the company against any loss

on the assets and liabilities transferred. But would not any one have supposed that the transfer of that enormous business was made for some reason? Was not this very mention of a guarantee enough to make men of experience in business aware that there were losses, and that there were liabilities which required a guarantee; and that it was because Gurneys wanted assets in carrying on a business enormously lucrative, no doubt, but requiring an enormous capital to render it lucrative? That it was because portions of their immense capital had been locked up in unremunerative assets or liabilities, that this transfer was originally designed and carried out? I appeal to you, as men of business, would not you have known from this prospectus that there were certain matters which the firm desired to get rid of; that in order to preserve their magnificent business, it was desired to bring new blood into the concern, but that their own wealth being very large, they thought that there was plenty of property to enable them to guarantee the purchasers against any possible loss or liability upon the transfer of the business?

Yet, as to the whole of the prospectus, it is suggested that it was fraudulent, because it was absurd to suppose that the business was a good one, or could possibly be remunerative in the hands of a company, and that the whole thing was a mere bubble, to be paralleled by the South Sea Company, or any other instance of "gigantic fraud" of which history affords a parallel. But the real truth of the matter is quite the reverse of all this.

This was an old and well established business. It was established in the last century; it was one of enormous amount, and from which the partners had retired from time to time with vast fortunes, and I suppose there was scarcely a larger or finer business in the world. There is no doubt that of late years large portions of the capital of the company became locked up in unprofitable speculations; that they had lent money to individuals, contractors, or companies, in many of which cases failures had taken

place, or changes of circumstances, and, in some instances, fraud; and the result was, that a large portion of the capital had become locked up, and was not available for the business of money-dealing and bill-broking.

It is true that to a great extent that business is a matter of credit, and that a great deal of it is done with the money of other people, and that the profit is made upon the rapid turn-over of the money which other persons leave in the hands of the dealers, the profit being the difference between what they *get* by using it, and what they have to *pay* for using it. That, no doubt, is true, but, at the same time, however large the amount that persons may be willing to trust in the hands of persons of well established reputation, there must be in such an enormous business as this a large amount of available capital to meet a panic, or to realise at once enough to cover some large loss. It was, therefore, necessary that a great amount of new capital should be brought in.

Because losses were incurred in exceptional advances, that does not at all militate against the undoubted fact of the vast earning power of the proper business of the house, which was estimated at from £180,000 to £190,000 a year. Thus we have to deal here with a business of that enormous earning power. It is not said that the money-dealing and bill-broking business of Overend & Gurney suffered in the hands of the company, or that the *legitimate* business of the house went down during the nine months of the company's existence. It was, therefore, a large business which the firm had to deal with, and which they had a right to deal with as they did. They had a great lock-up of capital, but they had a great credit and goodwill, which enabled them, if they had the capital, to earn that enormous amount. They had enormous private property; they had some securities besides their own individual estates; they had various assets in funds, which they proposed to set off against that lock-up, and which, in their judgment, covered it. If it could have been

covered, Overend & Co. would have been at this moment in existence, doing a large and lucrative business. The whole depended upon whether the estimate was fair and *bond fide* and reasonable—not whether it was correct, and, in the result, successful, but whether it was fair and reasonable. If the defendants had been dishonest, and had contemplated a fraud, they would have withdrawn their capital and their estates and their private property, and would have allowed their great house to collapse, and pay what it could under a bankruptcy. But what did they do? From the time when these exceptional losses commenced, they carried the profits of the proper business to a reserve fund. They then stopped all advances upon the doubtful accounts, and then they proceeded to dispose of their *legitimate* and proper business of money-dealing and bill-broking, making their whole private estates liable for their losses. They took to themselves every asset known to be bad or doubtful, and the whole case for the prosecution proceeds upon the delusion of forgetting this, and confounding assets with liabilities; and because there were *bad* assets, and persons who owed Gurneys great sums did not pay them (although, if they had, there would have been no occasion for the formation of a company, or for a guarantee of any deficiency), it is represented that they were *liabilities*, and that they formed part of the assets transferred. But the real truth is, that they transferred only the *good business*. All these bad accounts they kept to themselves, on a separate account, though the assets realised were to go to that account. If only the losses could be met, the concern would have been saved; and if the old firm, by its property, could meet them, they would have the good-will of a business of immense amount which they could dispose of. Could the losses be met?—that is the question. There was a valuation of the property, and if it was reasonable and fair, then I submit there is an end of the case. Then *was* it fair and reasonable? The evidence is that it *was* so. And it showed a surplus. Of

course, if there was no surplus,—if the affairs of the firm were in such a condition that it was hopeless to meet them, the good-will was worth nothing. But was it so? There was the enormous business; there was an immensely valuable business; there were £4,000,000 of bad debts; the question was, whether there were assets or estates to meet them. Upon the estimates, there were; and the evidence is, that the estimates were fair.

You must remember that you are trying these gentlemen upon a charge of conspiracy and fraud, and you must therefore be satisfied that there was a deliberate, wilful, fraudulent intention on their minds at the time of the transfer. If that was not so,—if there was not any fraudulent intention to deceive, then they did not conspire to defraud; there was no bad or fraudulent intention on their minds, and they ought to be acquitted. Let me impress upon you how unfair it is to judge such a case by the event.

And, further, you must consider it as clear that there must have been *bona fides* in the defendants, for they could not gain a shilling, nor relieve themselves of a shilling of liability, unless the concern was successful. They could not gain a sixpence, because they made themselves liable to the new company to the extent of every shilling of their private estates to pay the bad debts which they retained. Therefore they could *gain* nothing, and they could *relieve* themselves of nothing, unless the concern *succeeded*.

Could they have proceeded with greater fairness? They called in four independent men, whom they invited to join them, and they made a full disclosure of everything to them. Could they have done more? What motive could the new and independent directors have had to deceive and defraud themselves? I call in aid their high character and their independent position. Forgive me if I am in earnest in this case; because the honour, the character, the feelings, the *whole life* of these honourable men, is in my hands. Just put the case to yourselves, and ask your-

selves, in a similar case, how would you like to be judged by persons sitting in the position which you now occupy ? Suppose you could say that you had disclosed everything to independent gentlemen whom you had invited to join you, and who could have had no earthly motive to imperil their characters and their great fortunes in an enterprise not likely to succeed, would you not think that a jury ought to hold that conclusive, and that it was impossible you could have been fraudulent, seeing that such men, knowing everything, consented, at the peril of all they hold dear, to join you ?

No doubt, in the event, things did not turn out as had been expected. But you are men of business, and you know that property is of one value to-day and another to-morrow ; and you know that, from one cause or another, circumstances may go against a concern, and that men may be, and often are, the victims of circumstances, and not of their own wickedness or folly.

I might stop here, and say that the prosecution has broken down—it certainly has, if you agree with me that the estimates were honest ; but the case has been supported by suggestions and insinuations rather than evidence, and these I proceed to notice.

(After entering elaborately into the various points made in the evidence, the Solicitor-General proceeded to comment on the deeds)—

In the first deed a going concern is transferred at a certain sum, and there are certain excepted accounts and securities connected with them, kept out of the transfer. The mode in which those accounts are to be kept, the liabilities to arise on those accounts, the separation between the old firm and the company in respect of those accounts, all mentioned, and an obligation imposed upon the old firm that, in liquidating and closing those accounts, they should never make the company liable, and that they should act under the direction of the directors in liquidating and closing those accounts. All that is disclosed in the deed,

which was shown to any of the shareholders who desired to see it. And can there be any question that it was not true, to everybody who read and understood that deed, that there was a very large question which was not dealt with?

Then the second deed deals with the accounts thus excepted, and with those accounts alone; and it shows that they were to be retained in the hands of the old firm, who were to deal with them within a limited time fixed by the deed, and that any benefit which arose from the realisation of any of the assets connected with the old debts was to go to the company. This was said to be fraudulent, but could there be anything fairer?

It is said that any one who had seen this deed would have been deterred from taking shares. But that would depend upon whether the guarantees were sufficient, a question already dealt with. It is, in another form, the question whether the estimate of assets was fair. If so, it was an honest transaction. The real question, therefore, is whether the valuation was sufficient and reasonable.

The real truth is, that no one took shares upon deeds; few even looked at any deed at all, and they took their shares on the faith of the prospectus. It was in proof said that they took their shares on the credit of the name of Gurneys; and that thus to deal with their names was fraudulent, as their concern was hopelessly insolvent and worthless. That, again, comes back to the same question, whether it was so. I do not know what fraud there is in trading upon an honest reputation. If Gurneys had a reputation upon which people were prepared to trust them, I cannot understand that there was anything fraudulent in making use of it.

In truth, it is difficult to make out what the case for the prosecution is, beyond the suggestion that the business was worthless and the partners hopelessly insolvent. Thus again comes the question, Was that so?

As to the suggested conspiracy to concoct fraudulent

on which they relied to extricate them from their difficulties, a thousand times more difficult.

You have been told by the counsel for the prosecution that the issue in this case is one! upon which millions depend. Like everything else suggested in support of the prosecution, that is entirely fallacious and without foundation. No millions depend on this issue. Not a shilling, not a single farthing more, can be extracted from the pockets of these gentlemen which has not already been sacrificed. So far as they are concerned, they are already ruined men; and the world can do no worse for them than the world has already done. But there is another issue, of the deepest and most painful nature, which is confided to your hands. It is the issue which concerns the honour, the happiness, and the character of these gentlemen to the end of their lives. Gentlemen, I have not yet made, and I do not propose to make, any appeal to your feelings. Allusions to the case of the South Sea Bubble, such as have been made by the counsel for the prosecution, are but flimsy disguises for rude and daring assaults upon you through the medium of prejudices, to which, I am sure, you are superior. They are but ornamental modes of inciting you to do that which is unjust. And when the counsel for the prosecution talks of having "courage" enough to seize the glorious opportunity of doing justice by convicting these gentlemen of fraud—courage indeed!—there is not much courage needed to bear hardly upon men already borne down and overwhelmed by the weight of prejudice and calumny. A far truer and nobler courage would move you rather to stand up between injustice and its victims—to set at naught popular prejudice and clamour, if you are convinced that it is unjust, and to do right, simply because it is right to do it. If I were disposed to quote, gentlemen, I should quote from a greater than Virgil and a juster than Brutus. "Whatsoever ye would that men should do unto you, do ye even so unto them!" Judge others as you

would yourselves be judged! If you do so, the defendants will be contented. I am quite sure that you will do so; and I leave them, with absolute confidence, to your sense of truth and justice.

Sir J. Karslake addressed the jury on behalf of Mr Gordon. He believed, he said, that he should best discharge his duty by dealing with the case rather broadly than in detail; for after the exhaustive speech of the Solicitor-General, who had addressed them on behalf of the members of the old firm, he should rather weaken the force of his arguments if he ventured to repeat them. But he addressed them on behalf of one of the new directors. In doing so, far be it from him to throw blame upon the others. If the case as against them had failed, of course there was nothing for the new directors to answer. Still, it might be thought by some that there was more for the old directors to answer than the new. And, if so, it was only to be regretted that the prosecutor should have shut the mouths of the new directors, and excluded their testimony in favour of the old by including them all alike in the same indictment. What possible interest had Mr Gordon in the concoction of a fraud? That question naturally arose, and it was one upon which no evidence had been offered. It was suggested that it was not necessary that there should be any interest in a conspiracy, or a person a party to it. But there was certainly a necessity for some bad motive, and in this case there was an absence of all possible motive for fraud. Mr Gordon had been for years chairman of the Oriental Bank, in which the prosecutor had shares, and the prosecutor declared that he had entered into Gurneys' company in a great degree in consequence of his faith in Mr Gordon's name and character. What stronger testimony could there be to the character of Mr Gordon? What possible interest or motive had he in becoming party to a fraud? He was entirely unconnected with the members of the firm of Overend & Gurney. That being so, he took 200 shares in the com-

pany, which involved a loss of £8000 in the event of its failure. Was it likely that he would have done this if he had had any idea of fraud? The theory of the prosecution was, that Mr Gordon had invested £8000 in a scheme he knew to be a fraud, and certain to end in a crash. Was it creditable that the chairman of one of the greatest banks in London would have taken such a suicidal course? And all for the sake of strangers, of persons with whom he had no connexion! The case had been likened to a mock auction; but what would be thought of an indictment for fraud in a mock auction, in a case in which the defendant had himself bought many of the articles at the same prices as the rest?

You know the history of the case. You must never forget that the company was formed only for the purpose of taking the business of money-dealers and bill-brokers. You know that the business of money-dealers and bill-brokers was so large that no parallel could be found to it; and it was *that* which was to be transferred. The case for the prosecution has been rested upon the assumption that four millions of assets were transferred which were bad. That is not so. There were ten millions of assets transferred (there being fourteen millions altogether), and of those ten millions there is no evidence that they were bad. Therefore the transaction was this: "We transfer to you, what places you in our position as regards ten millions of those assets; we give you, besides, the sanction of our name—a name as well known throughout Europe as any firm could be; we propose to you to give us half a million for that profitable business." The whole burden of the indictment is, that instead of half a million being the value of the good-will, they knew that the good-will was worth nothing. But was that so? Suppose Messrs Gurney had said: "We intend to go into the *Gazette* tomorrow. We will transfer to you, for half a million, and every good asset we have, and we will keep to ourselves every bad asset we have; we will give you the benefit of our

connexion." Ask yourselves whether half a million could have been an enormous sum to give for such a consideration? And that is the way in which the transaction appeared to those proposed purchasers, the new directors. It was a transfer of the business and the good assets. There were, in addition to the assets to be transferred, four millions of assets which were not to be transferred, and which were never transferred; for the firm did not ask the company to take them, and they were to be kept by the old firm and wound up by them; and then the arrangement was this: "We give you the business; we give you the credit in our books, to the amount of more than a million; and, in addition to that, we give you every shilling which is from time to time realised on the excepted accounts (calculated at a million); and, finally, we guarantee our own solvency for our debt or liability to you for the residue, by the whole of our private property." And then, upon that arrangement, the prospectus was issued.

Where was the fraud in Mr Gordon's lending his name to a company which was to take over a business worth £190,000 a year, with ten millions of good assets, and a personal liability to the extent of four millions thus guaranteed from the transferring parties?

Much was attempted to be made of alterations in the draft of the prospectus originally drawn by Mr Gordon. Here is one of the evidences of fraud: Mr Gordon had written "peculiar;" Mr Gurney altered it to "well-known!" Here is another fraud: Mr Gordon had written—"The directors, in introducing this most important company to the public, deem it unnecessary to point out its great advantages." Mr Gurney wrote—"To dwell on its great advantages!" Really the difficulty is to place it before you seriously as evidence of fraud. At the end of this wicked document there is a note by the author to this effect—"Allusion also might be made to the fact of the immediate enjoyment of a large and profitable business." I should have thought that (assuming that the business

to be transferred was a profitable and *bond fide* business) not to have pointed out its advantages would have been madness on the part of the directors. You perfectly well know how infinitely more valuable is a company which is taken over, as a going concern, than a company which has to be established for the first time. That is an observation which might naturally occur to a man of business.

It was suggested, on the part of the prosecution, that, if the new directors did not investigate the affairs of the firm, they were liable for issuing this prospectus as if they had known it to be false. But that was a complete mistake as to the law, which has been corrected by the Lord Chief-Justice. And if they did not know anything false as to the prospectus, and were innocent of any fraudulent intention, they would *not* be liable on this indictment.

But I am not content, on the part of Mr Gordon, with this ground of defence; and I maintain that he fully believed, and had a right to believe, the representations which were made by the partners in the old firm, and that he proceeded throughout the transaction on the faith of representations which he believed to be true. He found himself connected with gentlemen who took thousands of shares in the company, and he took hundreds of shares himself. That shows that he *believed* in it.

Now, just let me call your attention to one fact, which I will place in the front of the defence; and I will ask you to bear that fact in mind until you give your verdict. Consider, what possible motive or inducement could Mr Gordon have had to engage in a conspiracy to bring out a company, which he knew must come to ruin, and thus cause him enormous losses? It is in evidence that he was utterly unconnected with the old firm. He had been for sixteen years chairman of the Oriental Bank. The prosecutor himself stated that he was induced to take shares in a great degree through his faith in the high character of Mr Gordon. You cannot surely suppose that a gentleman of this high position in the city of London was about to

sacrifice that position for the purpose of fostering or upholding a worthless and ruinous scheme. He took two hundred shares, and knew that, if the company failed, he must lose £8000. What corresponding advantage was he to gain? It was suggested that it might be the remuneration to the directors, at the rate of £500 a year; but that was to be allotted according to attendance, and the absurdity of the argument is this, that the concern is suggested to have been so absolutely rotten, that no sooner would it be established than it would be certain to come down. So that if Mr Gordon knew that it was fraudulent, he knew that he would be certain to lose £8000. For he kept his shares to the last, and never sold any of them, though he, as well as the others, might have sold them at high premiums. This is equally true of the others; they did not sell their shares (except for the benefit of the company), and remained the holders until the failure. Does that look as if Mr Gordon was actuated by fraud in becoming a member of the company? or does it look as if he *bonâ fide* believed that this, which he thought might be a great and flourishing company, was one which he was fairly entitled to ask the public to join, and one which, to the best of his ability, from first to last, under adverse circumstances, he worked and promoted? Is it credible that one of the most trusted directors of one of the most respectable companies in the city of London would engage in a fraud for the benefit of strangers, to the loss of thousands, and to the destruction of his own character?

Then, as to the deeds, and the charge which was made for months about the deception supposed to have been practised upon the shareholders by the non-disclosure of the second deed, it is difficult to deal with such a charge, when we know that scarcely any of the shareholders cared about deeds at all. The prosecutor was asked whether, if he had known of the second deed, he would have taken shares.* But how can a man know what he might or

* See the remarks of the Lord Chancellor, *ante*, p. 61, and the Lord Chief-Justice, *post*.

might not have done under a given state of circumstances some years ago? The question was pronounced inadmissible, and surely it is utterly immaterial. But if any person had looked at the deed which was disclosed, he would have seen that there were clauses and exceptions in it which would indicate to any one that there must be some other deed entered into in order to make the transaction complete. Any one who had taken the trouble to scan the first deed, would have found that the scheme is fairly explained upon the face of it. The money-dealing and bill-broking business alone was transferred, and the assets incident to it. And there were clauses and exceptions in it showing that it was for the directors to purge out certain of the accounts, and to put them on a different footing from the assets transferred. And not only so, but it was expressly stated that further deeds for the purpose of carrying out the transaction were to be entered into. Anybody who read that deed could have seen that there were certain excepted accounts to be afterwards dealt with. And if any one had asked what they were,* he would have been entitled to explanation. The evidence as to the deeds proves the reverse of fraud on the part of the new directors. They had separate counsel; and the alterations made by him were for the purpose of securing the whole effect of the advantage which was to be derived by the company from the transfer. Then, as to sending only one deed to the Stock Exchange, it was the act of the solicitor, who simply sent the deed which was the deed of transfer referred to in the prospectus, and which on the face of it disclosed that there must be another, fully to carry out the arrangement.

Consider the state of the case as it must have appeared to the directors at the time they issued the prospectus, and ask yourselves whether they could have had any possible interest in starting a company which, according to the case for the prosecution, must in a short time come to an end,

* *Vide ante*, p. 10.

and involve them in ruin and in discredit as the most fraudulent or most foolish persons in the city of London. On the other hand, take a plain and probable and simple view of their conduct ; that they had satisfied themselves that the firm had good assets, to the amount of ten millions, and a business producing £180,000 a year ; and four millions of doubtful assets, amply met or guaranteed by a real value of a million, and their private balances of a million, and by the whole of their vast private estates. Such was the state of the case as it then appeared to the directors, and what fraud could there have been in acting in such a view of it ? Looking at the case, and at the prospectus, by the light of the evidence which has been given as to what might fairly be believed to be the state of things at the time, and not with the eyes of men who know what has since taken place, is there anything which can bring you to believe that there was fraud ?

The fair way of reading a prospectus is, to see whether it will bear an honest construction ; it is not until you find some dishonesty indicated by the representation of the facts that there is any right to represent it as fraudulent. What is stated in the prospectus is, that, " in the opinion of the directors," the business could not fail to secure a highly remunerative return. And was there not grounds on which they might honestly think so ?

The question before you is, whether the defendants have been guilty of fraud. And it is for you to say whether that charge is made out. But, on the part of my client, I am not satisfied with that. I want you to go with me in what I ask you to find—that he has not only not been guilty legally of fraud, but that it is shown in the case that, however he may have erred in his belief as to the results that might be expected from the formation of the company, he honestly applied his mind to the consideration of the circumstances under which it was proposed to transfer the business, and honestly expressed his opinion to the public, which he backed up by his conduct ; that

the business, if taken over under ordinary circumstances, was one which could not fail to result in a handsome return to the shareholders. This is what I ask on the part of my client, Mr Gordon—not to escape from this cruel indictment merely by your thinking that the evidence does not support it; but I hope to carry to your minds, and to the minds of the public, the conviction that, so far from there having been fraud on his part, he entered into the transaction simply and solely for the purpose of carrying out what he thought was a most profitable transaction, and that but for this belief it is perfectly obvious—so far as any conceivable motive is concerned—he would never have entered into it at all. He has already, as you know, to undergo an amount of degradation, which he can hardly bear up against. It is no slight thing for a man in his position to be charged with fraud. You know that he was brought up as a criminal at the Mansion House. You know that but for his having friends around him, the prosecutor might have succeeded in placing him, and those indicted with him, in a common jail. That is not a slight thing for a man who has walked in the city of London in the character and capacity which have been filled by him. But ever since the accusation has been made against him, he has been one of those most anxious to press it on for the consideration and determination of a jury. On his behalf I appeal to you—not as a man who stands before you to ask you in mercy to acquit him, but as a man who demands at your hands, upon the strongest evidence, and upon the strongest interpretation that could be put upon the evidence for the prosecution, and only from a feeling that it would be unjust in you to find any other verdict—to acquit him by your verdict, in the eyes of the public, of that offence, of which his own conscience already acquits him!

Mr Mellish, who addressed the jury on behalf of Mr Barclay, said, that after the speech of the Solicitor-General, it must be entirely unnecessary for him to enter into the

general question, whether the prospectus was fraudulent, or whether there was a general fraudulent conspiracy on the part of the directors, the defendants, to cheat and defraud the public. The whole case for the prosecution, he observed, turned upon this—What was the intention actuating the mind of each particular defendant when he became a director of the company, and invited others to become shareholders in it? Did he believe that the old firm was insolvent, and that the new company would be a rotten concern? Did he join it for the purpose of cheating the public? or did he believe that the new company, in all human probability (subject, of course, to such risks as every company which is engaged in a speculative concern must be subject to), would be beneficial to the public?

There is this difference in the case of Mr Barclay—that he joined the company at a much later period than the other defendants, and had nothing to do with the prospectus. He was, like the other new directors, entirely unconnected with the old firm in business. And the supposition on the part of the prosecution is, that he was willing to throw away his perfectly unblemished reputation simply to join them in practising a fraud upon the public. It was said that the case was that of men who had agreed together to have a mock auction, to sell glass for diamonds, and pewter for silver. Then the supposition is, that the old firm must have gone to the others, and said, “We are going to be rogues, and cheats, and scoundrels; will you join us?” Was there ever a case in which persons of position would join such a fraudulent conspiracy, when those who were so asked to join it were not to put any part of the plunder into their own pockets, but were actually to advance large sums out of their own pockets, and run the risk, or, rather, incur the certainty, of losing them?

The question is—Do you believe that, from the communications made to the new directors to induce them to join the company, they would infer that the old firm

was insolvent, and the concern rotten, so that there was no reasonable prospect of profit from it? If the members of the firm were, as they were believed to be, honest and honourable men, they must have themselves believed the estimate on which the transaction was conducted, and must have believed the representations they made in the prospectus; and, of course, if they so believed, they would communicate that belief to the new directors. Would it be likely to induce a man of high reputation and good fortune to join the concern if he was told that the firm was insolvent and the concern rotten and worthless? Yet that is the case for the prosecution. That the members of the old firm, being fraudulent, disclosed their fraudulent intention to honourable and independent men, and induced them to join them—surely that is incredible.

What you are inquiring into is the intention of the defendants at the time they entered into this transaction. You cannot have any direct evidence as to their intentions, for, by being all included in the prosecution, all of them are excluded as witnesses. You can only judge of his intentions by his acts. And where is the evidence of fraudulent intention? The question being whether the defendant believed it to be a rotten concern, or one likely to be profitable, what better evidence can be given that he believed it likely to be profitable than that he embarked £50,000 of his own money in it? If that does not satisfy you of his honesty, what evidence possibly could convince you? He took one thousand shares, which involved a liability for £50,000, and he kept them. Is it conceivable that he should have done this if he believed the concern worthless?

As to the deeds, it is true that, in a civil court, a man may be held bound by any deed he has executed, whether he has read it or not, and in a court of equity he may be even bound by its recitals. But that is not so in criminal proceedings, where there is no such presumption; and, bringing your own common sense and knowledge of the

affairs of life to bear upon the matter, you must be aware that men often execute deeds without really and actually knowing and understanding all that is in them. There is no evidence of fraud in the deeds, because there is no evidence that any of the directors knew that there were to be two, or knew what was in either of them, or that one was shown to the public and that the other was not. But even if there were such evidence, what proof of fraud would there be? What was the substance of the arrangement? That the old firm were to transfer their assets and liabilities to the company, but that the company were to be at liberty to reject any portion of the accounts forming the assets to which they had an objection, and that these were to be retained by the old firm, and wound up by them. That was in the *first* deed. And the real object of it, one would think, would be palpable to any man of business. It was an object that all the contracts relating to the exceptional accounts should be made in the name of the old firm, so that the *company* might not be liable upon them, or held out to the world as carrying on that exceptional kind of business, which they desired to abandon. That was the substance of the first deed—that the assets were to be transferred, subject to the right of the directors of the company to reject any accounts which they objected to, and subject to the liability of the old firm to wind up these excepted accounts. And then there was a general covenant, by which the old firm made themselves responsible for any sum by which their assets might be less than the liabilities.

Then the second deed carried that out. The case for the prosecution as to the deeds is, that the deeds are contradictory; but there is no difference between them. The main object of the second deed was to state in detail how the accounts were to be kept, for the purpose of showing how these complicated transactions were to be adjusted. It was objected that the assets of the excepted accounts were taken out of the control of the company, and left in

the power of the old firm. That was necessary thus far, to enable them to wind up the accounts. But the second deed—in this respect more beneficial to the company than the first—contains an express covenant; that, as those assets were realised, the proceeds were to be paid over to the company. So that it is quite incorrect to represent that these assets were taken out of the control of the company. And then the second deed limits a period within which these accounts could be wound up.

As to this, it was only reasonable that the firm should have a reasonable period to wind up such accounts. But then there was a third deed, providing that if, in the meantime, any of the members became insolvent, then the sum due from him to the suspense account should become due at once.

It is said that there was a schedule to the second deed, which would have disclosed the amount and nature of these excepted accounts. But if you read it, you will find that there is only the name of one company (the Millwall) mentioned by name; and the sums are not mentioned in the second deed, any more than in the first. You might read the deeds through without finding out the amount of the doubtful assets.

In what way are these deeds evidence of fraud? What is there in the arrangement thus carried out which was fraudulent?

It is said that the old firm were "hopelessly insolvent;" but there is an ambiguity in that phrase. What is meant by it? If it was meant that the assets embarked in the business* were not equal to the liabilities, then no one doubts it. No one could read the prospectus and the first deed without seeing that in all probability it was so. But surely it is absurd to say that a partnership is insolvent because the partnership assets are less than the liabilities, if the partners themselves are men of enormous wealth, capable of paying their debts, and having a large surplus.

* That is, the partnership assets.

For in the case of an ordinary partnership, every member is liable to pay the debts of the firm to the last shilling he possesses. When a firm carries on the business of receiving money from the public, and employing it, and making a profit on it, it may go on for years with its liabilities exceeding its assets; and if the partners, during that time, are men of great wealth, able, out of their private means, to pay off any deficiency, what does it matter? Their landed estates; their mortgages; their shares, or their money in the funds, are all as good securities—nay, better, for those who are dealing with them, than the money in the firm. The money in the firm might be employed in hazardous speculations, and go; the landed estates, and mortgages, and funds would remain, and, if the firm stopped, would be liable to creditors. It is therefore a fallacy to speak of an ordinary firm being insolvent, simply because its assets do not equal its liabilities. If the partners are men of large fortune, and ample private means to meet them, what evidence of fraud, therefore, is there in the case as against the new directors? They believed that the concern would be prosperous. They showed this belief by taking shares, and keeping them to the last.

Mr Giffard addressed the jury on behalf of another of the new directors, Mr Rennie.* This, he said, is a criminal case, and you must be aware of the disadvantages which attend a person who is made a defendant in a criminal case. To some extent, the law has mitigated that disadvantage. In the first place, the prosecutor must establish, beyond a doubt, the guilt which he imputes to the accused; and, in the next case, it is, as a matter of practice, proper and usual, when the accused has made a statement before the magistrates, to put it in.

The Lord Chief-Justice observed that, without going so far as to say that it was the right of the accused, he should think that it was only right and proper that it should be so.

* Who had made an answer in Chancery, and also a statement when before the Lord Mayor, *vide ante*.

Mr Giffard.—That is all that I say. It is so commonly the practice, that it is almost one of the ordinary features of a criminal prosecution that the accused's statement should be put in—not, of course, as necessarily true, but to enable the Court to ascertain what the truth is; and if it is one in which any untruth can be shown, then that is most important evidence for the Crown. And this defendant not only made a statement before the magistrate, but made an answer on oath in Chancery. Nevertheless, the defendant's statement has not been put in, and there has been no attempt to prove it to be untrue. You are trying, in this case, whether, in the words quoted by the counsel for the prosecution, there has been—

“An offence, consisting in a wicked concert, contrivance, and combination of individuals, to effect some private or public injury.”

In other words, you are trying whether these defendants conspired. Negligence so gross, that no reasonable person could have so acted, may be evidence of fraud. But what you have to find in substance is, whether there was a criminal concert and design. The general nature of the design imputed that they conspired together to throw their losses on the public. And the case is mainly based upon the nature of the doubtful assets, which, it is said, were represented as part of the fifteen millions of assets. But where, if at all, was it so represented? Not in the prospectus, but in the books. There is a fallacy in confounding what was put forth to the public and what was contained in the books. If there had been an allegation in the prospectus that there were fifteen millions of good assets, or that all the assets were good, it would have been otherwise. But it was not so; and, on the contrary, it was disclosed in the prospectus that there would probably be a deficiency on the assets. As to the deeds, the whole history of them shows *bona fides* on the part of the directors. Taking the private assets into account, there was a surplus. And where is the evidence of fraud?

At the close of the case (on the ninth day), the Lord Chief-Justice proceeded to sum up the case as follows:—

Gentlemen of the Jury—It is a great satisfaction to my mind, oppressed as I feel with the sense of responsibility which attaches to the duty I have now to perform, to think that this case is to be decided by twelve gentlemen of this commercial community, familiar with commercial and monetary transactions, conversant with accounts, and thoroughly acquainted with all the incidents of mercantile life. It would be presumption in me to think that, in such a case, I could afford you material assistance. At the same time, I feel it to be my duty to bring before you, in a connected form, the materials upon which it appears to me that your judgment ought to be formed. Having done that, I shall leave you to draw your own conclusions, satisfied that the decision of so competent a tribunal will be that which justice to all parties requires.

My first duty will be to state to you the law upon the subject; and, in the first place, let me draw your attention to the indictment upon which the defendants are put upon their trial. It contains various counts, between some of which and others it is necessary to distinguish with regard to the cases of the several defendants. The first six counts of this indictment are framed upon a recent statute, the 24th and 25th of the Queen, chapter 96, section 84, which provides that, “Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour, and, being convicted thereof,

shall be liable at the discretion of the Court to any of the punishments which the Court may award, as hereinbefore last mentioned." After these counts, framed upon that statute, there follow counts for a conspiracy to publish a prospectus with intent to deceive and defraud.

These latter counts being for a conspiracy to commit the statutory offence to which I have just been referring, the counsel for the defendants are no doubt right in supposing that they were introduced for the purpose of meeting the possible defence that the defendants, having been put upon their oaths in proceedings in the Court of Chancery, might have had an answer on the statute, inasmuch as it contains an express provision of indemnity in respect of matters which have been disclosed by directors or parties in a similar position in the course of such proceedings. The only material difference in the present case is this, that one of the defendants, Mr Barclay, cannot be convicted upon the first six counts—and, if the case had rested upon these counts, I should, when application was made to me on his behalf by his learned counsel, have directed an acquittal—because it is quite clear, upon the evidence, that Mr Barclay had nothing to do with the publishing of this prospectus. Having become a member and a director of the company, he left the country before the prospectus was taken in hand: he cannot, therefore, be convicted of having published or concurred in publishing the prospectus in question. But when we come to the counts for conspiracy, the case stands otherwise; and I therefore could not consent to the application that Mr Barclay should be at once dismissed from this trial. For, if once a conspiracy to do an unlawful act exists, and that conspiracy is to be carried out by such means as will effectuate its accomplishment, whatever is done by any of the parties to it, with a view to further and carry out its objects, is the act of all: wherefore, if you should be of opinion by and by that there was here a conspiracy to carry out the fraudulent purpose ascribed to these defendants, and you believe Mr

Barclay to have been a party to that conspiracy, and that the publication of the prospectus was an act done in furtherance of the conspiracy, Mr Barclay will be liable, like the rest, to be convicted on the conspiracy counts.

Besides the counts for conspiracy to commit the statutory offence, there is one for a conspiracy to publish a prospectus known to be false, with intent to excite in the public mind a belief that the company was carrying on a prosperous business, and that its affairs were in a sound and prosperous condition, with intent to induce persons ignorant of its condition to become shareholders; with an allegation that the defendants did thereby induce Dr Thom, the prosecutor, to take shares. There are similar counts with respect to other parties.

Now, as to these counts, I must tell you that, with the exception of one or two of the persons to whom these counts individually refer, I am of opinion that they cannot be sustained. I quite agree, as I shall presently more particularly point out, that where there is a conspiracy to defraud the world at large, it is quite enough that a person is induced to part with his money to the conspirators to entitle him to say that there has been a conspiracy against him. But with regard to the case of Dr Thom, and of several of the other parties, they were not brought into contact with the defendants at all. They did not take their shares from the company; they went into the market, and bought from other persons. Their vendors might have said, "There was a conspiracy to defraud us;" but I think it cannot be said, at least in a criminal case, that there was a conspiracy to defraud individual persons, still less that individual persons were actually defrauded through the conspiracy, who never were brought into contact with the conspirators. The conspiracy was to defraud those who would part with their money as the price of the shares and hand it over to the company as the recipients of the price. Not, however, that this will make any material difference in this case; because there certainly is one person of those to whom these counts relate who bought

immediately of the company—I mean Mr Beard ; and of course a conviction on one count would be just as good as a conviction on the others. Therefore, although I think it necessary to point out this distinction as I go along, it will have no material influence on the ultimate decision of this case.

There is, next, a general count for a conspiracy to publish a prospectus known to be false in material particulars, with intent to defraud and deceive generally, and to induce persons to become shareholders. Then there are certain counts for obtaining money by false pretences ; first, from Dr Thom, and then from the other persons who bought shares, and whose names have been introduced in the course of this discussion. Here I again make the distinction, which I have before pointed out. Then there is a count—the last count in this indictment—which is general in its terms, but which proceeds to set out the particulars in which the prospectus is said to have been false and fraudulent, and to which therefore I will call your attention. It states that the defendants were directors of this company ; that they contracted to purchase a business of no value from Samuel Gurney and others, who were unable to pay their debts ; and that, contriving to make it appear to persons willing to purchase shares that the pecuniary affairs of the company were prosperous, and the business of the firm solvent and prosperous, and intending to deceive persons who should become shareholders, they conspired to publish the prospectus, and, with intent to deceive persons willing to become purchasers of shares, falsely pretended, first, that it was not necessary to call up more than £15 a share ; secondly, that the pecuniary affairs of the firm were prosperous ; thirdly, that the business was worth £500,000 ; fourthly, that three members of the firm had consented to join the board, and would retain a large pecuniary interest ; and then alleges that the defendants did, by the false prospectus and false pretences, induce Dr Thom and others to purchase shares.

Gentlemen, that count contains really the substance of the charge against the defendants on the present occasion ; and the charge spread over the numerous counts

of this indictment and reproduced in a variety of forms, really in substance is that which was stated to you by the learned counsel for the prosecution in his opening. It is in substance this, that the business of Overend, Gurney, & Co. being hopelessly insolvent and worthless, these defendants, knowing that fact, conspired to induce persons to take shares in a new company, to which that business should be transferred, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would have to pay. That is the sum and substance of the charge. If you shall believe in the end that such a conspiracy did in fact exist, that this business was worthless, that the defendants knew it to be so, and knowing it to be worthless disposed of it as being of value, with intent to defraud the intended shareholders of the price they were to pay for their shares, there can be no possible doubt that they have committed an offence against the law. For, not only does the Act of Parliament to which I have called your attention make, whether the result of a conspiracy or not, the publishing of statements known to be false, in order to induce persons to take shares, an offence, but there can be no doubt, upon the general law of the land, that a conspiracy to defraud and cheat by means of false pretences is an offence, and an offence of a very serious nature. It is not the less an offence because it is directed against society at large, and because the machinations of the conspirators may not have been directed against particular individuals.

If a number of persons combine and confederate to cheat a particular individual, there can be no doubt that that is a criminal conspiracy at law. It is not the less so because the persons to be caught and to be deceived are not individually in the eye and contemplation of the conspirators. That was settled long ago in the case to which the learned counsel for the prosecution referred, the case of the *King v. De Berenger and others*; and whatever remarks Mr Solicitor-General may have made—and I do not at all controvert what he says—to show that the verdict in that

case was unsatisfactory, yet there can be no doubt that, when the Court of King's Bench came to consider the law upon the subject, their decision was founded on sound and wise principles, and that it has since been received and ought to be received as law: namely, that it is not because a conspiracy to defraud is directed against the general public, it is the less an offence, by reason that you have not in your eye a particular individual who is to be defrauded. Independently of which it is quite plain that any conspiracy, having for its purpose to defraud those individuals of the general public who may be caught by it, is a continuing conspiracy until it shall have arrived at the accomplishment of its purpose. As soon as the particular individual is brought into contact with the conspirators, the conspiracy, which before was general, becomes, in his case, if I may use the expression, individualised and fixed; and that which was a conspiracy to deceive and defraud the general public becomes a conspiracy to deceive and defraud the particular individual.

Therefore, gentlemen, if you should come to the conclusion by and by that this charge, as I have stated the substance of it to you, is made out, you need not trouble yourselves about the counts in this indictment. There are counts in it which will sustain the charge; and in pronouncing a general verdict of guilty, you need not trouble yourselves with distinguishing between one count and another, although I have thought it my duty to point out what were the specific charges which are brought against these defendants.

Now, gentlemen, while I have stated the law to you as I conceive it to be, I must take the earliest opportunity which the case affords of pointing out to you a distinction which it is most material you should bear in mind. We are not here to inquire into the propriety of the proceedings of the defendants. We are not here to inquire whether there may have been misrepresentations or concealments, of which the shareholders might have availed themselves in a civil proceeding. It may be that there was such a degree

of misrepresentation, as that, if an action had been brought upon an implied warranty, the shareholder might have been entitled to recover back the price he had paid : it may be that, alleging that the consideration for which he paid his price had wholly failed, he might have been entitled to recover back that price ; that if an action had been brought to enforce calls, he might have had good ground for resisting the payment asked for. That is not what we are inquiring into. In order to convict the defendants upon this indictment, you must be satisfied that there was a deliberate design to deceive and cheat the public, or such individuals of it as should lend themselves to the purpose. Unless you are satisfied of that you cannot convict the defendants upon this indictment. In consequence of one or two observations addressed to me, either orally or in writing, by one or two members of the jury, it has occurred to me more than once that possibly this distinction is not sufficiently present to your minds. In a case of this kind, we are, as it were, upon the very confines which separate the civil and the criminal law, and we must take care that we do not overstep the boundary line. It is one thing that a man may make himself liable to an action, or may be liable to have a contract which he seeks to enforce held to be bad, because he has stated something which went beyond the exact line of truth, or has concealed some material fact which ought to have been made known to the other contracting party ; but more than this is required to support this charge. A man may honestly misrepresent—that is to say, he may state as true something which he believes to be true, but which turns out to be untrue. If he has given a warranty, or has entered into a civil contract founded on the assertion of the fact in question, he may be liable in a civil action to be defeated ; but that would not be sufficient for the present purpose. Here you must be satisfied that that which is alleged to have been misrepresented was known to the defendants to be false, and that, acting upon that knowledge, and with the deliberate intention to deceive and

defraud, they did that which is alleged to have constituted the criminal offence for which they are now put upon their trial.

Having pointed out these distinctions to you, I go back to what I before told you is the real charge in this case, and you will see that it involves four questions. In the first place, and this is one of the greatest possible importance, what was the state of the business of Overend, Gurney, & Co.? Was it the worthless, hopeless, insolvent business which, on the part of the prosecution, it has been represented to you to have been? If it was, was its condition known to the defendants? If it was, have they misrepresented its state and condition to the world? If so, what was their intention? Was it thereby to deceive persons into taking worthless shares and paying for them in money, which money was to be appropriated to the benefit of the defendants?

These are the questions which appear to me to be all-important in the present case, and I will take them in the order in which I have placed them before you. In the first place, was this business, at the time of the transfer, the worthless business which the prosecution has represented it to be? In order to determine that question, it appears to me necessary to go somewhat back into the history of this mercantile establishment. That the house of Overend, Gurney, & Co. was doing a vast, I had almost said a gigantic, business for very many years, is a fact too notorious not to be within the knowledge of every one of you. But it is not unimportant to turn to the figures, in order to see what was the amount of business actually done by that house. Now it appears that during the six and a half years which elapsed from the year 1859 to July 31, 1865, both inclusive, the amount of money turned over in that establishment amounted to £1,115,876,172. From 1859 to 1864, both inclusive—I leave out now the last six months which were included in the former figures—the amount of money turned over was £938,575,000 in

round numbers, the average for those six years being, in round numbers, £156,500,000 per annum. The bills discounted during the period between 1860 and 1864, both inclusive, a period of five years, amounted to £321,325,000, being an average on the five years of £64,265,000. The profits upon that period, as extracted from the books of the company, have been given to us in a tabular form by Mr Harding, and the profits appear to have been in proportion to the vast amount of business done. In 1851, we have £156,769; in 1852, £186,386; in 1853, £212,977; in 1854, £153,500; in 1855, £155,256; in 1856, £148,617; in 1857, £144,460, that being notoriously an unfavourable year; in 1858, £293,628; in 1859, £442,074; in 1860, £343,373.

Now this amount of profit appears to have been divided into two branches, one being appropriated to the amount to be divided among the different partners, the other being carried to a reserve fund. In 1853 there is no profit divided. It appears that at that time the firm had sustained a loss of £219,753 by advances made on fraudulent metal warrants. There was no division of profits, therefore, in that year; and again, in 1857, a notoriously unfavourable year, they appear to have carried the whole of the profits, amounting to £144,460, to the reserve fund. Nevertheless, although no profits were divided in those two years, it stands as the ultimate result that, upon an average of these ten years, there was an amount of £220,000 a year of profits; and, although there was no division of the profits in the two years, 1853 and 1857, yet there was, on the average of the ten years, a division among the partners of £136,000 per annum. I have now taken you through the table of profits for the ten years down to 1860, inclusive.

The next remarkable feature in the history of this case is that, from that period down to the final termination of the business of Overend, Gurney, & Co., the working earning power appears never to have undergone the slightest diminution; and yet, during 1860, 1861, 1862,

1863, 1864, and the half of 1865, no profits appear ever to have been divided. The cause is now well known. The fact is that the firm had sustained most grievous losses by reason of the most wild and insane speculations.

I presume that about 1861, although there was the usual amount of business done, from which, under other circumstances, a large amount of profit would have resulted, the capital began to be absorbed by these extravagant speculations, and from that time no profits were divided; and by the middle of 1865 such a state of things had arisen, as that, upon an account of £15,000,000, in order to balance the two sides of the account, and to make the assets correspond with the liabilities, it was necessary to set down to the score of assets a sum of £4,213,896, which consisted of bad, or at all events of doubtful, debts. Not, indeed, that the whole of the sum of £4,213,896, which constituted the present deficit, was at that time believed to be what I may call a permanent deficit. It was anticipated and believed, as far as I can judge, that upon that sum of £4,213,896—call it, for the sake of brevity, in round numbers £4,000,000—of bad and doubtful debts, there would be a sum of £1,000,000 in round numbers to be recovered. But, even thus, there stood on the books of the company a deficit of at least three millions of money. Under these circumstances, what was to be done? It is clear that upon an account of £15,000,000, a deficit of £3,000,000 is neither more nor less than insolvency. What, then, was to be done? It was plain that at any moment any alarm in the public mind about the position of Overend, Gurney, & Co., or any one of those crises which from time to time take place in the commercial world, and which might cause a run upon this establishment, would bring it down with a crash. At all events, it was clear that it was insolvent. It might perhaps have gone on. One of the liquidators, I think Mr Harding, said that he saw no reason why, in this state of affairs, the old firm should not have gone on. But would it have been right for them to do so? I think most assuredly

not. A business which is conducted with other people's money, such as the business of a banker or of a dealer in money, if it comes to that pass that there is so large a deficit as to amount to insolvency, ought at once to be brought to a close. The man who takes your money or mine, which he is bound in honesty as well as in law to restore, when he knows he is insolvent, and that if he should be called upon by his creditors to pay them he would be without the means of doing so, commits a fraud upon us. I think, therefore, the firm were perfectly right in declining to go on under those circumstances; and Mr John Henry Gurney was perfectly right in declining, as we find from his uncle's letters that he did, to continue the business of Overend, Gurney, & Co., under the then existing circumstances. But, then, what was to be done? There was one alternative, which is that which Mr Kenealy, on the part of the prosecution, said ought to have been adopted—namely, bankruptcy. They might have become bankrupt—have realised upon their large estates, and paid their creditors as far as the assets of the firm and their own private property would go. But I cannot help thinking that we ought to make some allowance for men who, under the circumstances in which the defendants—at least the old firm—were placed, hesitated to adopt that alternative. The effect of it must, of course, have been to destroy the concern; the business would have been scattered to the winds, the name would have been lost, and this was that which men in the position of the Messrs Gurney, with such a business, with such a name, would naturally shrink from, if it could possibly be avoided. One cannot blame them, therefore, if there was any other course open to them, that they did not adopt the alternative which it is now suggested they should have pursued. What, then, is to be done by a man who has a good business, but who, by some unforeseen circumstance—the failure of debtors, or the failure of enterprises in which he has embarked capital—finds himself in a position in which he cannot balance the two sides of his accounts,

and who, therefore, if he were called upon to meet his creditors to-morrow, would not be in a position to do it? What is the course to be adopted under those circumstances? You may either sell your business for what it will fetch—but which may possibly involve a considerable sacrifice—or you may—and this I believe is the course usually adopted under such circumstances—endeavour to obtain some new partner or partners, who will bring in capital to supply the existing deficit, and to whom you, who were before the sole and exclusive proprietor, must then make over a portion of it in consideration of the price which they pay, in order to effect the restoration of the business to its full activity and power. Now nobody, I think, can doubt that such a course is perfectly legitimate, provided always that the man who has to dispose of the business, or who has to take in fresh partners, is perfectly honest and open, and fully makes known to any one with whom he proposes to have one or other of these transactions, all the circumstances which are necessary to enable any one who is to buy the business, or to come into it, fully to appreciate all its merits or demerits, what he takes upon himself in the shape of liabilities, and what he is likely to realise in the shape of prospective advantage. But if, on the other hand, the person who finds himself in the position to which I have referred is guilty of deliberate misrepresentation for the purpose of fraud; if he knows that his business is not only insolvent for the moment, but that it is, to all intents and purposes, unsound and hopelessly insolvent; if he misrepresents its true state, or has recourse to artifice or concealment to prevent the other party from knowing what is the true condition of things, he is guilty of fraud; and if a body of men combine to carry out such an iniquitous proceeding, they are guilty of a conspiracy in the eye of the law. You will have to form your own judgment as to which of these two courses it was which the defendants in this instance pursued.

Now, Overend, Gurney, & Co. made up their minds to

dispose of this business, but, at the same time, to retain an interest in it. They proposed to make over the concern to a joint-stock company, but to take a given number of shares in the undertaking themselves. In what form, and in what terms ought they to have made the proposal to those whom they invited to join them in the new undertaking, so as to make the true state of the case perfectly intelligible and known to those with whom they were dealing? Suppose the case were between one or two individuals possessed of such a business, and one or two others to whom they proposed to join them in their business, the old proprietors would say something of this sort: "Here is a business of vast earning power, capable of producing, and which has produced during a series of years, such and such an amount of profit; but it is crippled by losses which have absorbed a portion of its capital, and it is not in a present position to go on as it ought to do: upon an account of fifteen millions there is a present deficit of four millions, and an eventual deficit of three millions. We propose to sell this business, and to take a share in it under the new form. With regard, however, to the three millions, we will reduce it thus: we are creditors of the partnership in our individual capacity to the extent of one million in round numbers; that million stands upon the debtor side of the account, and it is by reason that it so stands upon the side of the account which represents liabilities that, after we shall have taken credit for the million which will hereafter be realised upon the bad debts, there will still remain a deficit of three millions. Now, we propose to you that, instead of this deficit thus standing at three millions, we will write out the million which stands to our private credit and to the debit of the firm—the effect being, that if that million be deducted from the amount of liabilities, the latter will be reduced to two millions. That being so, we ask £500,000 for the transfer of this business." Still, you see, there would remain the awkward deficit of two millions. But suppose the old proprietors

were to go on and say this: "You know who we are; you know that we are men of great wealth, of large landed and personal property; that we are good for two millions: we will guarantee that, in a certain space of time—namely, in three and a half years—whatever shall prove deficient upon the assets now standing in the account, we, out of our private property, though it may cost us the sacrifice of every shilling's worth of it, will make good the deficiency, so that none shall remain." But then they would be told—"True it is that upon the present state of the firm's accounts, in the way you represent things, there will be a deficit only of two millions; and true it is that your property may be sufficient to cover that deficit; but, in addition to the actual existing liabilities, there is a large amount of contingent liability—namely, a million—which you have guaranteed to other parties; and your private property, though it may be worth two millions, would have to be answerable in respect of those guarantees, just as much as, according to your proposal, it would be answerable for the deficit in our account." This would no doubt be true; and the result of it would be, that the property being valued at two millions, and there being an admitted deficit of two millions, there would only be sufficient to satisfy one million of that deficit. The result of these things, therefore, is, that there would still remain a deficit of a million.

This I take to be the result of these figures, assuming—a question which I shall come to presently—that these figures are such as you can rely upon. The present deficit of four millions, reduced to three millions by the estimated value of the doubtful debts, is again reduced to two millions by striking out from the liability side of the account that which stands in the private ledger as due to the individual partners; and to meet that deficit of two millions, you have the guarantee of all the property of the old firm. But the value of this property, on the other hand, is again reduced in value to one million by reason of the guarantee given to other parties to the extent of a million. That

being so, the property of the firm would be effectual as a guarantee for one million only, and that there would be still a deficit of a million. Now, gentlemen, suppose that that is the result of the figures, and that there is a deficit of a million, which is certain to fall, sooner or later, upon the new partners whom it is proposed to introduce. Was this business, to the persons to whom it was proposed to come into it, of sufficient value to make it worth their while to put down a million of money in order to meet the existing deficit? To make the proposal more palatable, the old firm further offers this: "The business is worth at least £500,000, after taking into consideration all the drawbacks which can possibly attach to it, and we ask you £500,000 for it; but we will do this with you: we will not ask you to pay a farthing of the amount in cash; we will dispose of it in this way—£250,000 shall simply be ours on paper against the guarantee which we give you to make good out of our private property the deficit which will remain. We will agree to write the £250,000 off against that guarantee; you will, therefore, not have to pay us a farthing of it in cash. As regards the other £250,000, we will take it in shares, upon which £15 shall be taken to have been paid up. The number of shares which you will thus appropriate to us will make up this £250,000; but even then, we don't ask you to hand over the shares to us; they shall be hypothecated to the same guarantee; they shall remain in your possession; and if we fail in any of our engagements to you, you shall be at liberty at once to turn these shares into money, to take them into the market, and dispose of them at what price you can get; and you shall apply the proceeds towards satisfying any claim you may hereafter have upon us." The result, then, upon this arrangement is, that the business, with its working and earning power wholly undiminished, is, according to the terms of the bargain, to be transferred to the new proprietors without their having to pay to the old ones a single farthing in the shape of cash; but the former have to intro-

duce a million in order to make good the deficiency which may be calculated to remain after everything has been done which could be done, on the part of the old firm, to liquidate the amount of deficit which would still remain. Was this a worthless thing, or was it not? Now that is a matter, gentlemen, which you are so fully competent to judge of, that I need not dwell longer upon this part of the case.

If the earning power of this company was undiminished; if the profits which they had made in past years, when it was not hampered by all the dead weight of this unfortunate mass of bad debts arising from imprudent speculations, were capable of being made again; if its power of earning profit, which you may take at something like £200,000 a year, or very near it, remained as it was before; and what was required—there being no present outlay of cash to satisfy the old proprietors—was simply the introduction of a million of money to cover the eventual deficit, and to enable the company to go on—was it worth any one's while to give that million of money so to be introduced into the business?—a question to be determined, I apprehend, by the business which would be done, and the amount of profit which would be realised, in the working of the business. Suppose that one of you had been a large capitalist—I hope many of you are—I mean a capitalist to whom (we have heard of such persons) hundreds of thousands are as nothing, and that not yet tired of business, you had been disposed to apply your capital in what appeared a prudent and advantageous speculation, and that the affairs of this company, as I have just placed them before you, had been brought to your knowledge, and you had been told that you need not pay a single shilling of the price down, but that it would be necessary for you to introduce a million of money into the business, to enable you to go on; and that then, upon looking to the affairs and the accounts of the company, you had seen that it had done for years the amount of business and had made the amount of profits to which I have referred; that it had done that during a

long series of years, until it got into these difficulties, arising from special circumstances having no connexion with the legitimate or proper business of the firm, and you had had a million at your disposal, would you have thought it worth while to enter into the speculation? or would you have treated a proposal to you to enter into it upon those terms as delusive and fraudulent, intended only to cheat you out of the money you were required to introduce? And, observe, that having brought the balance, the ultimate deficit, down to a million, as I think these figures do bring it out, the sum which the new company or the new shareholders were to introduce was just the very sum, or only a little in excess of the sum, to which I have been referring—for, £1,250,000 was the sum which the shareholders were to bring in. The total amount, you know, was to be £15 paid upon each share, or £1,500,000. But £250,000 of that was to be written off, or, at all events, locked up, in respect of the shares which were to be allotted to the three original proprietors. Thus there would remain a balance of £1,250,000, brought by the shareholders into this concern, to balance the deficit which it was contemplated would eventually remain, and to enable the business to go on without difficulty or apprehension of any impending danger.

Of course, gentlemen, everything turns upon whether these figures can be relied upon or not. The learned counsel for the prosecution would here interpose and say, Granted that if these figures are correct, and you can make out that a million was all that was wanted to set a business going which was capable of producing £200,000 a year, although every one might not perhaps like to enter into such a speculation, yet no one can well say that such a proposal was fraudulent, or that such an arrangement and bargain, if made, was a mere handing over of a worthless and hopelessly insolvent business. But then the learned counsel denies the accuracy of those figures.

In the first place, he says, "The assets were estimated at a million; they have produced, when they came to be realised, only half that amount. The private fortunes of the old partners were estimated at £2,200,000—call it, in round numbers, two millions—and they have produced only £700,000 or £800,000. You talk of the earning power of the business; you talk of its profits; but the real fact is, that the business collapsed from its own inherent rottenness in the course of nine months after the new company was called into existence, and made no profit. When you talk of profits which were made in times past, I doubt your books, and I deny that those profits have been proved ever to have been in fact realised."

Gentlemen, we must first correct one or two of those assertions, and then we must see what is the value of the rest.

In the first place, when it is said that the private estates of the old partners only realised £700,000 or £800,000, we must add to that a sum of several hundred thousand pounds—in round numbers, I may state it as half a million—which was realised before the fall of the company, and which was carried to the credit of the guarantee account; and yet it remains perfectly true that the assets and the private property have not realised by any means what was expected. But then we must take into account the circumstances under which they were realised. We are told that those circumstances were most disadvantageous; that the time has been bad for realising upon anything and everything, and that this applies both to the doubtful debts and the securities held in respect of them, and also to the estates and private property of the partners.

Now you know, gentlemen, much better than I can pretend to know, from your own acquaintance with the commercial world, whether it is true that property which has had to be realised within the last two or three years has been realised under very disadvantageous circum-

stances. We know, from the history of the commerce and trade of this country, that occasional periods do occur in which, after great commercial activity, reaction takes place ; when everything is, as it were, stagnant ; when, fortunes not being made, landed estates are not so much in demand,—when, in fact, there are more sellers than there are buyers, and when goods and property of every description, especially if you have to realise under legal process or obligation, fetch far less than they would do if sold at a more prosperous time, and under more favourable circumstances. We have been told by both the official liquidators, persons from their position well qualified to form a judgment upon such matters, that property of every sort, especially property which had to be realised under such circumstances, has been sold at a very great disadvantage. On that you will form your own judgment.

Then, again, with regard to the collapse of the business to which Mr Kenealy has referred, undoubtedly it has collapsed. It collapsed at the end of nine months ; but was that owing to what has been termed its inherent rottenness, or was it owing to extrinsic causes ? It certainly did not do less than it had done before ; for we know that, in a period of nine months, £166,000,000 of money were turned over. You will find that in that time there were bills of exchange taken to the amount of £56,000,000, which would be at the rate of £75,000,000 a year—an amount not exceeded, I think, in any of those years when the prosperity of the house was altogether untouched. The working power, therefore, being undiminished, I must say that I do not see how you can ascribe to the inherent rottenness of the concern the rapid termination of its existence, which took place in May 1866. It has been pointed out, and very properly so, that whatever may have been the amount of business done during this period, the profits were, comparatively speaking, nothing. It does not appear that in the nine months the profits exceeded £4000. But then it is said, on the part of the defendants—All this is

capable of easy explanation. We went on doing well until the month of January. From the 1st of August, in the preceding year, to the 13th of January, our deposits continued to increase, and our business sustained no diminution ; but early in 1866 a combination of causes tended to work mischief to our concern. In the first place, the interest of money gradually increased ; from $3\frac{1}{2}$ per cent., which was the interest on money when we began, it rose as high as 8 per cent. before we stopped. This will account for the poverty of our profits, inasmuch as a great portion of our business must be done by re-discounting ; and if you have the rate of interest increasing upon you beyond that which you have asked for the bills you have taken, it is clear that, instead of making a profit, you must realise a loss. Therefore, say the defendants, the calamity of that period was a very powerful cause in preventing us from realising the profits we otherwise should have done ; but the great cause which led to our downfall was the alarm which sprang up in the public mind, and which has nothing on earth to do with the intrinsic state of our business. About that time it began to be bruited abroad that some of the Messrs Gurney were realising their property. This inspired alarm and distrust ; persons who had money standing with us immediately proceeded to withdraw it, and in the four months between the 13th of January and the 10th of May, when we finally stopped, no less a sum than £4,000,000 was withdrawn from our coffers—a sum sufficient to paralyze any establishment, no matter how sound, how solvent, or how flourishing it might have been.

Gentlemen, if you believe the statement that £4,000,000 were actually withdrawn in the four months preceding the downfall of the company, I think we have a circumstance which sufficiently accounts for the catastrophe which followed. But the learned counsel for the prosecution maintains that such is not the fact. He says, if you look at the general ledger of the company, you will not find any such

figures; you get them only from a book called the Statistic Book of the Company. He says he does not know what that book is, and he distrusts it. He admits that, when looked at, it looks very regular: it purports to be an account kept from week to week, and it shows apparently the amount of deposits and of borrowed money withdrawn. But he says it does not correspond with the general ledger, and that he distrusts the book, and those from whom it comes. Mr Harding, however, being asked how he got that book, answered—Why, it was handed over to me as the official liquidator of the company, by the secretary of the company, among the books of the company. I have never doubted its genuineness; I have never doubted its honesty. The learned counsel for the prosecution suggests, however—not upon any evidence, but upon his own unsupported surmise—I had almost said unwarranted suspicion—that Mr Bois, the secretary of the company, has concocted this account, has fabricated these entries, and then taken advantage of some communication which he was holding with the official liquidator to shuffle in this book amongst the other documents, in order that the defendants might afterwards be enabled to refer to it, as one of the books of the company, in order to show that £4,000,000 had been withdrawn from them, and so to account for the fact of their stoppage and downfall.

Gentlemen, I should not be doing my duty if I did not say that, in my opinion, this is going far beyond the limits to which those who represent a prosecution are entitled to go. If there had been any evidence to show anything of the kind, well and good; but there is nothing. At the same time, it was perfectly fair to point out that, when you looked at the items of the general ledger, they did not correspond with the book; and at first, when this was put to Mr Harding, he certainly seemed very much bewildered and puzzled at the apparent discrepancy. You must judge whether he did not fully account for this apparent dis-

crepancy by the evidence he gave after he had had an opportunity of further examining the general ledger. Says he, it is perfectly true that, if you look only to the items to which you directed my attention in the general ledger, there is only an amount apparent there of £2,500,000 as having been withdrawn ; but when I come to look further into the ledger, I find that, in addition to the loans from country bankers and deposits from depositors, there were a great number of persons with whom the firm had a species of banking accounts, who put money in on special terms, as to notice or otherwise, which they were entitled, at very short notice, to withdraw. If those accounts are taken into consideration, they will reconcile the statements as to moneys withdrawn, as appearing in the general ledger, with the statements which appear in the statistic book of the company.

It will be for you, gentlemen, to say, under the circumstances, whether you can, as reasonable men, entertain any doubt that the statistic book does truly represent this part of the company's affairs, and that, in fact, there was withdrawn, in the period to which I am referring—namely, the four months—a sum of £4,000,000. In that case it will be for you to say whether you believe that the limited company broke down from circumstances necessarily inherent in its pecuniary constitution, or whether it broke down from a combination of external causes which could not be reasonably anticipated at the time when the bargain between the old firm and the new company was entered into.

With regard to the profits in the past years, it may perhaps be true that the profits are not brought out in the precise form in which you, as commercial men, would think that such accounts ought to have been kept. The balance-sheets are defective, and if this had been the case with reference only to the recent dealings of the company in the years or months which immediately preceded the transaction into which we are inquiring, it would have borne, perhaps, a suspicious aspect. But while I have to observe

to you that we are not now considering whether the old firm kept their books with that commercial accuracy, or according to that commercial practice, which you would desire to uphold, I must further point out to you that these accounts of profits are of ancient date, going back as far as the years 1850 and 1851 ; and therefore, in whatever form they appear, can you doubt that these entries, which are found by the official liquidator in the account-books of the company, are genuine entries, and the true representation of the amounts which were carried to the account of profits at that time, and which were divided between the partners as their respective shares? Now, it is perfectly true that we do not know exactly upon what basis the estimate of profit was founded. It may have been that it was more or less delusive ; it may have been that the whole of the discount upon bills was carried to profit, while sufficient account was not taken of what may possibly have been the losses upon bad bills, which were not eventually paid. We do not know, we have no means of knowing, how that amount of profit divided between the partners or carried to the reserve fund was got at. It is one of the misfortunes of the case that we have no such evidence. But even supposing that you should think that these amounts of profit thus appearing in the books are not altogether satisfactory, still, can you doubt that a business of that magnitude, in which such a large sum of money was turned over, and such a vast amount of bills were discounted, could have been otherwise than a profitable concern, supposing that the transactions had been confined entirely to the legitimate and proper business of the company, and that its capital had not been diverted into other and illegitimate channels?

A very competent witness, Mr Harding, has told us, that in his judgment the profits to be made upon such a business may be fairly estimated at from £180,000 to £190,000 a year. Attempts have been made to impugn the evidence of Mr Harding. It is said that he has made money by

former transactions with the old firm; I do not mean in commercial speculations, but in the shape of business done as an accountant. It is said that they have supported his appointment as one of the official liquidators, and that he comes here, therefore, with a bias on his mind in their favour; but it has been truly pointed out that no such observations apply to Mr Turquand, and it has not been made to appear that Mr Turquand in any way dissents from the conclusions at which his coadjutor has arrived. At all events, you can judge for yourselves—and that is the great advantage of having twelve gentlemen connected with the commercial world to try such a case as this—seeing that the amount of money turned over, the amount of bills discounted, and the amount of business done, stands upon figures that are not for a moment disputed. Judge for yourselves, making all due allowance for what you think ought to be taken off from these profits.

If you have any doubt about the principles upon which the profits were ascertained, or about the accounts in which they are entered, make any deduction or abatement you think proper, and then ask yourselves whether, if this business was capable of earning such profit as you think it must have earned, the terms of the bargain were fraudulent, or were such as might fairly be proposed by persons who desired either to dispose of the business or to take fresh partners into it. But then it is said that the estimate of the property of the partners is altogether incorrect. Here, again, we must depend very much upon what Mr Harding tells us on the subject.

But I must here interpose an observation, which I trust will have its due effect. The learned counsel for the prosecution says: Do not trouble me with estimates; do not talk to me about calculations; I look only—and I invite the jury to look only—to the broad facts and to the positive results. Here is an account showing a large deficit, arising from bad debts. It is said to have been calculated that a million of money would be realised upon these debts; it has not

been realised. Here is an estimate of the private property of the partners, which amounts to upwards of two millions of money; it has not realised half that amount. Do not talk to me of these things, or of the profits of the business, or of the business done, or of what it may have been calculated to be worth. It has all gone to ruin, and you must judge only by the results.

Gentlemen, you must, in the first instance, correct the data on which the learned counsel asks you to proceed, by the light of those circumstances, and of that evidence to which I have already directed your attention. But I have this further observation to make: it is not a question of what these things were actually worth, or what they have proved to be worth—the question is, What was honestly believed at that time to be the worth of this business and of this property? That is what we have to endeavour to arrive at; and to judge, as the learned counsel proposes to you, simply by the events which have taken place since, would be, I think, very likely to lead you to conclusions which a more careful and more correct analysis would show to be unfounded and unjust. We are dealing with a question of fraud, and we must therefore see what was the real belief at the time these estimates were made and these transactions were effected. Now, we know—imperfectly, it is true, but still as a fact which has transpired in the progress of this trial—that as between the old firm and those who were to come in as new directors, and who, in fact, were to be the representatives of the new shareholders, calculations as to the value of the assets and the property were gone into.

A paper has been found in the handwriting of Mr John Henry Gurney, covered with figures, and which came into the hands of the official liquidator, as one of the papers belonging to the company, or to the firm. We know from Mr Harding that he has made out his calculation by the light and assistance of this paper.

Let us see how the figures stand. According to these

figures, the private property of the partners was estimated at £1,658,000. The Lombard Street property was estimated at £40,000; making a total of £1,698,000—call it in round numbers £1,700,000. Then there was a sum in the Norwich Bank, standing to the credit of the old firm, which they were equally to give up, amounting to £590,281. You have therefore, in round numbers, a sum of £2,290,000. Was that at the time a fictitious, fraudulent estimate? or was it an honest one, although it might to a certain extent be influenced by the sanguine view that men always take of their own affairs and their own interests? Was that at the time an honest estimate? That these calculations were gone into between the old firm and the new comers is, I think, a matter upon which it is impossible to entertain a doubt. The great disadvantage under which we labour at the present moment is, that those who alone could tell us what actually passed,—who alone could tell us what discussion took place, what calculations were made, what figures were gone into, cannot, from the course which has been pursued, open their mouths to give us evidence upon that which it is so important for us to know.

And here I must say that, while I do not for a moment question or impugn the motives of the prosecutor in this case, or of those who are assisting him; while I give them the fullest credit for being actuated by public motives and by a sense of duty, they believing no doubt that a gigantic fraud has been practised upon them and the other shareholders who have entered into this enterprise, and that those who have thus defrauded them ought to be made responsible at the bar of a criminal court of justice, and that they are only doing their duty in bringing them there,—while I give them full credit for such motives, and cannot concur in any observations that have been made to their disparagement, I must say that I think it most unfortunate that in this case the new directors have been mixed up in the same prosecution and indict-

ment with the old. I know of no case which has produced so strong an impression on my mind in favour of what has long been my growing conviction, namely, that our system which commits the prosecution of offences against the public to a private prosecutor, a system which differs from that of every other European nation, is based upon a false principle. I cannot but think that a public prosecutor is necessary to the due and perfect administration of criminal justice. If there had been a public prosecutor here, I will undertake to say that he would not have put those three gentlemen on their trial. If called upon to prosecute the members of the old firm, he would no doubt have had recourse to them; he would have called upon them to make their statements to him; and if, in those statements, he had found matter upon which, in his judgment, the prosecution should go on against the members of the old firm, he would have availed himself of their evidence to support the prosecution, or, at all events, would have left them free, so that those who were to be put upon their defence should have the opportunity of calling before the jury who were to pass in judgment upon them those witnesses who, above all others, and perhaps alone of all others, could have thrown light upon this most important part of the case. But, inasmuch as the course taken by the prosecution has, as we were truly told by the Solicitor-General, shut the mouths of these parties, and prevented the other defendants from having the advantage of their evidence, we are bound in common justice to consider what has been the conduct of the gentlemen who thus came into this enterprise. Do you suppose that men of business, men of fortune, men of commercial position, would join themselves to a company of this kind, in which they were to embark large sums, without going into some calculations to see how far the terms proposed to them by the old proprietors were such as they could, as reasonable men, with prudence entertain? Can you suppose that they took the number of shares which we know they did take, and made them-

selves answerable for the large sums which they thereby became liable to pay, without having gone into this matter? Another striking fact is this—There came a time when they were called upon to answer for what was said to be a common delinquency. They were called upon to answer for a gigantic fraud in having induced the mass of shareholders to take their shares upon a representation that this was a sound company, or that, if under temporary embarrassment, in the end at all events it would come out all right and whole; they were charged with having made this representation fraudulently, and induced shareholders to pay down their perhaps hard-earned money for delusive, valueless shares. What would you have expected men under such circumstances to do? Why, to have said, "Don't blame us; we were the victims of the same delusion from the consequences of which you are now unfortunately suffering; we were taken in by the old firm; they told us that the assets would realise so much; they told us that their property was worth so much; it turns out that this was a delusion; we were ourselves deceived and misled, and are victims like yourselves." But what do they say? They say as far as they can say it—they have said it elsewhere, and they say it here by the mouths of their counsel—"We do not complain of the members of the old firm; we believe that they acted in a spirit of fairness and honour towards us; we admit that they disclosed everything to us; we knew all that it was essential we should know; we may have acted foolishly; we may have acted improvidently; we may have involved others in a common loss, but we cannot throw any blame on the members of the old firm; we cannot impugn either the honesty of their representations or of the project in which they invited us to embark."

Gentlemen, it is for you to say whether, upon the whole of this evidence to which I have called your attention, there is sufficient to satisfy you that this concern was, at the time this transfer took place, the worthless and

valueless affair which the prosecution seeks to make it out.

So much, then, for that first and very important head. I pass on to the second, which is, whether the defendants, if they represented this business as a sound and remunerative business, knew that it was otherwise. As to that, the facts which I have been bringing to your notice, the evidence to which I have directed your attention, seem to me to be immediately applicable, and will probably determine your view of the matter. As I have before said, it is not because the defendants may have taken a too sanguine view of their affairs and of the prospects of this concern, that therefore they are to be visited with a criminal prosecution. You must be satisfied that they knew that this concern was worthless; and that, knowing it to be so, they passed it off upon the public, or upon such of the public as would take shares, as being of value. When I say that, I do not mean that it would be necessary that the thing should be absolutely valueless; it would be sufficient if it were relatively so; that is to say, though the shares might eventually prove worth something, yet if they were in fact of a value altogether so disproportionate to the pretended value, that no man in his senses, if he had known all the circumstances, would have taken a share; and the defendants knowing this, combined to induce people to take the shares, with intent to defraud, that would be sufficient to support this charge.

Now, gentlemen, having dealt with the first two parts of the inquiry, and coming to the third, which is as to what the defendants represented to the public, I come to what may be called the overt acts of this conspiracy. Now, the first and foremost of these is the publishing the prospectus; and, as I read to you just now, the prospectus is alleged to have been fraudulent in the following particulars, viz.: that it was "not intended to call up more than £15 per share;" that "in the opinion of the directors the terms could not fail to be highly remunerative;" that "the

business would be handed over on the 1st of August, the vendors guaranteeing the company against loss on the assets;" that "John Henry Gurney, Henry Edmund Gurney, and Robert Birkbeck would retain a large pecuniary interest;" that "copies of the memorandum and articles of association and deed of covenant could be inspected."

Now, I think there are two or three heads here which we may very summarily dispose of: first, that it was not intended to call up more than £15 per share. Your view of how far that was true or not would, as it strikes me, materially depend upon whether you believed that there was the alleged conspiracy or not. If the parties believed that the undertaking was likely to be a successful one, then, inasmuch as the payment of £15 a share would, after deducting the shares retained by the old firm, realise, as I before pointed out, £1,250,000, the probability is, that they did not intend to raise more than £15 per share. If, on the other hand, you believe in the existence of the conspiracy, and that they intended to get all the money upon these shares, to the extent of £50 apiece, and to apply them to their own purposes, then, as this would form part and parcel of the conspiracy, the question is involved in the question of conspiracy. It strikes me, therefore, that this allegation is one upon which you need not further be detained.

I next call your attention to the statement that the "business would be handed over, the vendors guaranteeing the company against loss on the assets." There is no doubt it was part of this bargain, according to the terms of the deeds, that the vendors did guarantee the company against loss on the assets. If it is meant to be contended that while they guaranteed, in point of law, the guarantee was worth nothing in point of fact, this, again, will depend on whether you think that, in guaranteeing the amount of the deficit from their private property, they really believed that this property would be worth the amount which they under-

took to guarantee. Then comes the statement that "John Henry Gurney, Henry Edmund Gurney, and Robert Birkbeck would retain a large pecuniary interest." That may have been a mere flourish; I do not think there is much importance to be attached to it. But they did retain, in one sense, a large pecuniary interest, for they were to hold a large amount of shares, and the value of these shares depended entirely on the success of the concern.

But there are two important points in this prospectus to which I anxiously invite your particular attention. In the first place, what was the effect of the whole of this prospectus, coupled with the articles of association and with the deed referred to in the prospectus? Was it to produce an impression upon the minds of those who should read these documents, that the concern was substantially a sound one, in which men might embark their capital with fair and reasonable expectation of success? Whether the prospectus has that effect, you must judge, partly from its contents, and partly from the general evidence in the case.

I cannot help thinking that, looking at it as a whole, it certainly does bear the construction which the prosecutor seeks to put upon it. When it says that, looking to all the circumstances, and to the fact that a sum of £500,000 is all that is to be paid for this business, there is every prospect of a large and remunerative return to the shareholders, it certainly does hold this out as a sound and going concern. It is to be observed, at the same time, that it does no more than this; and it is, perhaps, as succinct and jejune a prospectus as one has ever seen. It is a complete mistake to say that it makes any representation as to the assets of the company, so far as the four millions of bad or doubtful assets are concerned.

And here I must say that I think the observations of the Solicitor-General as to what was said by the learned counsel for the prosecution in his final address to you were

not without foundation: for you certainly were told, again and again, perhaps in the heat of argument, that these debts had been represented as assets of the company. They are nowhere represented as anything of the kind; certainly not in the prospectus; certainly not in the deeds. On the contrary, the whole arrangement between the two parties—the old firm and the new directors—was based on the assumption that of these four millions only a limited proportion would be realised.

I should say that there is a marked difference between this prospectus and almost every other prospectus that has formed the foundation of legal proceedings, whether civil or criminal, that we have heard of late years. Generally, you know, there is some positive misrepresentation, or some material concealment, which vitiates the affirmative statements put forward. We have known of legal proceedings in consequence of assets being declared which did not exist; of liabilities being concealed which did; of anticipated returns which were altogether delusive and mere moonshine; of representations as to shares having been taken which, in fact, had not been taken, or where the number taken fell greatly short of what was represented,—where, in short, in various forms, the expectations and facts which had been held out to persons to invite them to join bubble schemes and fictitious companies, have been positive misrepresentations or actual perversions of the truth; and in most of those, you will bear in mind, the proceedings were of a civil, not of a criminal, character. Here we must be still more particular, to see that we do not import into this prospectus and the representations made by the directors to the proposed shareholders, anything beyond what these documents legitimately carry with them.

At the same time, if, looking at this prospectus, it is impossible to arrive at any other conclusion than that the directors intended to convey to the public that this was a concern in which, if shares should be taken, there was

every probability of a remunerative return, and you shall be of opinion by and by that this representation was intentionally delusive; the defendants will be answerable for that which they have stated: on the first counts, if the false representation was for the purpose of inducing persons to take shares, or on the counts for conspiracy, if this representation was for the purpose of defrauding them of their money in furtherance of the conspiracy.

It is further said, as to the statement in this prospectus relative to the affairs and state of the company, there is extrinsic evidence to show that this was all delusive. Several circumstances are referred to on which the learned counsel for the prosecution dwelt with considerable emphasis.

The first is the meeting which took place in St James's Square. I cannot help saying that I think it would have been better if this part of the case had been omitted. That, because the meeting took place in the house of one of the directors in St James's Square, you should be asked, in the absence of all other evidence—there being nothing to show under what circumstances and for what reason that place was preferred to the premises in Lombard Street—to infer that fraud was contemplated, seems to me, I must say, a most staggering and unsatisfactory proposition: that, because the lawyer was asked to be present when these two sets of intended partners, the old firm and the intended new directors, met to consider the terms upon which the transaction should be arranged between them, fraud must have been intended, does seem to me a most strange hallucination, and one which I can hardly account for in a man of the undoubted ability and power which the learned counsel manifested in the conduct of this case and in his address to you. I cannot imagine anything more singular than the suggestion that because this meeting took place in St James's Square instead of in Lombard Street, and because the lawyer was present, there must have been fraud and wickedness at the bottom of it.

But, beside this, it is urged as a proof of deliberate fraud that Mr Gordon drew up a prospectus in terms so flowery and exaggerated, that, even before it was submitted to the directors, somebody thought it necessary to modify many of the phrases contained in it, and that, after all, though so altered and modified, it could not be accepted by the directors; that they threw it on one side, and adopted the far more modest statement found in the prospectus, and that therefore there must have been fraud contemplated on the part of Mr Gordon. Well, you have the two documents before you. It is no doubt true that the statement prepared by Mr Gordon was more flowery, and more in the usual prospectus style than the more modest document afterwards published to the world; but that, because the body of the directors thought it right to put forward only such a moderate and temperate statement as might appear to be consistent with propriety, because they qualified the expressions contained in Mr Gordon's draft, and reduced them to the comparatively modest dimensions of the published prospectus, you should be asked to assume, in the total absence of proof of any kind, that fraud was intended, that the directors were prepared to go any lengths, and were only deterred by fear of the law, and influenced only by the desire of keeping exactly within its limit, so as to escape its penalties, does appear to me wholly unwarranted.

I must say, having had a great deal to do with the administration of criminal justice, either at the bar or on the bench, that suggestions of that kind are not conceived in the spirit, are not in accordance with the spirit, which ought to animate those who conduct public prosecutions. I should have been disposed to draw, and you will probably draw, exactly the opposite inference.

When you find a body of men sitting down to determine in what way a project and an undertaking they propose to offer to the public shall be described, and you find them cutting down exuberance of assertion or style, and reducing their statements to moderate and fair proportions,

so far from believing that they have been actuated by a criminal and fraudulent spirit, you would, on the contrary, as I should conceive, draw the very opposite inference.

We now come to the second ground upon which this prospectus is impugned, namely, that it contains a reference only to one of the two deeds by which the arrangement between the old firm and the new company was to be carried out. Undoubtedly it is true that the prospectus does refer to one deed only, while I think it is equally true that, to enable anybody to understand the exact nature of this undertaking, and the terms upon which the newcomers were to be introduced into the concern, it was necessary that it should be known that there were two deeds. Now, how came this to pass? Mr Jones has given evidence upon the subject, and you will weigh that evidence well, and judge for yourselves how far you can implicitly rely on it. His account of it is this: The arrangement afterwards carried out by the two deeds having been agreed upon between the old firm and the newcomers, it was necessary that effect should be given to it by a legal instrument. He applied to an eminent conveyancer, Mr Braithwaite, to prepare the necessary deed or deeds. Mr Braithwaite thought it better there should be two deeds; Mr Jones says it was not for him to interfere with what counsel thought to be necessary and right. Accordingly Mr Braithwaite prepared the drafts of two deeds—the one simply providing for the transfer of the business, with its assets and liabilities, to the new company; the other intended to fix and settle the terms of the arrangement according to which those accounts which the new company, or rather the directors of the new company, did not intend to take to, namely these four millions of doubtful debts, should be realised, as far as it was possible, by the old firm for the benefit of the new. Mr Braithwaite having prepared the drafts of the two deeds, Mr Jones says that, in the course of his duty, he submitted them to the new directors, Mr Gordon and Mr Rennie. Mr Gordon and

Mr Rennie said, however, that, as they were in fact the representatives of those who should become shareholders, and might therefore have interests antagonistic to those of the members of the old firm, who were the sellers, they being the buyers, it would be more satisfactory that they, the buyers, should be represented by separate solicitors and counsel. In this I think every one will see that there was nothing which could excite surprise. On the contrary, every one will agree, I think, that Mr Gordon and Mr Rennie were perfectly right in what they did. Mr Jones goes on to say that he was desired to put himself in communication with Messrs Wilson, Bristow, and Carmael, the solicitors to the Oriental Bank, of which Mr Gordon was chairman, and these gentlemen employed their own conveyancing counsel, namely, Mr Fooks. When Mr Fooks came to see the drafts of the deeds, he was not satisfied with them; he thought they were not sufficiently stringent or minute to secure the interests of the new company and the new shareholders. Accordingly he made numerous alterations, which alterations had again to be submitted to Mr Braithwaite, who did not accede to many of them, and so the two conveyancing counsel had to meet from time to time, and see if they could get over the difficulties which one or the other suggested. By all this course of proceeding time was consumed. A general election was impending. Mr Fooks went out of town with a view to some electioneering objects he had in view, and so additional delay was caused. It had been arranged with the brokers that the prospectus should be issued on the 12th of July. The 11th arrived, and still no deed had been settled, and it was impossible to issue the prospectus without referring to the deed. Then Mr Jones says—"I with difficulty got a meeting of the two counsel on the 11th, and then, after much discussion, the terms of the first deed were agreed to, and that deed was considered as finally settled and done with. Accordingly we were enabled, on the ensuing day, to issue the prospectus; and as there was but one deed

executed, and but one deed then in existence, the prospectus refers to one deed only ; the second deed remained to be further considered. It was discussed again and again ; the counsel were unable to agree upon it. Mr Fooks was most particular and rigorous in exacting such conditions as he thought necessary for the interests of his clients ; the draft was cut about in all directions." When we come to look at the draft we find that that is so. But it seems that, by the 25th of July, all difficulties had been overcome, and on that day the draft was returned as finally settled, with the assent of the two conveyancing counsel.

On the 8th of August, or shortly before the 8th of August, application was made to the Stock Exchange by the brokers of the new company for a settlement. The Stock Exchange, answering through their secretary, say—You must send us certain documents ; amongst others the deed by which the interest of the old firm is transferred to the new company. They had the prospectus before them, and, of course, in the prospectus, they would see mention of one deed only. In the documents sent to the Stock Exchange, as in the prospectus, one deed only is referred to ; so one deed only was asked for, and one deed only was sent. Now, at that time—the 12th of August, which was the day on which the documents were sent to the Stock Exchange—it is an undoubted fact that two deeds existed. It is equally certain that only one deed was sent. But Mr Jones again offers this explanation. He says—"Inasmuch as in the prospectus only one deed was referred to, and that was the essential deed which effected the transfer to the new company, I, acting upon my own judgment, sent only one deed to the Stock Exchange." But then, when the counsel for the prosecution called for the second deed, or rather the draft of the second deed as finally settled, and when the draft as finally settled was produced, unfortunately it appeared to be signed as having been settled by the counsel on the 11th of July. Thereupon, it is naturally said, how is it that, if this deed

was signed as settled on the 11th of July, you can now say it was not settled until the 25th? It certainly is an awkward question, but Mr Jones says that the reason was that the deeds purported to be of even date, and it would have been awkward to have the date in each deed of the 27th of July, if it appeared upon the draft, as settled, that the one was settled on the 11th and the other upon the 25th. Therefore, says he, we antedated it, and the counsel signed it as of the 11th, the date of the other deed. I do not understand that you are asked to disbelieve what Mr Jones says; still it is an awkward and an unpleasant circumstance that a very material part of the arrangement to be carried out is contained in the second deed, and that no reference is made to it in the prospectus, and that the second deed, although already executed, was not sent to the Stock Exchange, in answer to their requirements, on the 12th of August.

The Solicitor-General.—Your Lordship will remember that the date upon the original draft of the second deed, containing Mr Fooks's approval, was the 18th of July, which is therefore a corroboration of Mr Jones.

The Lord Chief-Justice.—That is certainly an important fact which had escaped my attention. I am obliged to the learned Solicitor-General for pointing it out. That date of the 18th of July shows that the draft had passed Mr Fooks's hand at that time.

Gentlemen, we have next to ask ourselves if the directors had anything to do with the not sending this draft to the Stock Exchange. We have, I think, two witnesses as to that. It appears that upon Mr Slater receiving the letter of the secretary of the Stock Exchange, he immediately submitted it to the next Board meeting, whereupon, on the 8th of August, a resolution was passed, "That the secretary (Mr Slater at that time acting as secretary) do send to the Stock Exchange the particulars required, and that he apply to the solicitor for such particulars." That, at least, is the substance of it; I am not sure whether those are the precise words. Then says Mr Slater, "I did apply to

the solicitor; I had no instructions whatever from the directors to keep back any deed; I had no instructions to apply to the solicitor for one deed rather than for two; I simply acted in obedience to the terms of the resolution, which directed me to ask the solicitor for such documents as would satisfy the requirements of the Stock Exchange. I did so; the solicitor gave me only one deed, and I therefore sent that one deed. But the directors had nothing to do with that." Then Mr Jones goes on and says, "I acted therein upon my own judgment; I had no communication with the directors; I did not receive any instructions from them not to send the second deed; but, inasmuch as one deed only was referred to in the prospectus, I thought it was sufficient to send only one deed, namely, the first deed."

Now I think it is quite impossible not to feel that this was an unfortunate proceeding, to say the least of it. The prospectus leads to the supposition that there was one deed only; but the true nature and effect of the transaction could not be known from the single deed. I cannot help thinking that the shareholders who were invited to join in this undertaking ought to have been told that there was a second deed; and that the Stock Exchange, who exercise a wholesome and useful influence on the formation of companies, by the power which they have of withholding settlements if they are not satisfied that all necessary preliminaries have been complied with, ought to have been told that there was a second deed.

I cannot help here observing that the public should take warning by this not to trust too much to the exercise of this authority; for it is impossible for anybody conversant with these matters, to look at that first deed, and not see that something more is required in order to carry out what it finally contemplates as to take place between the parties. But the Stock Exchange passed it, and granted a settlement.

I cannot but think that the shareholders ought in some way or other to have been apprised of what was the ar-

rangement between the old firm and themselves ; not that I believe, with regard to the great mass of the shareholders, that it would have made the slightest difference. It is all very well for men, when they find they have embarked in a ruinous enterprise, to turn round and say, " Oh dear, if you had only told me that there was a second deed, I should have gone and looked at it, and then I should have seen that there was a deficiency of assets, which, if ever made good at all, was to remain unsatisfied for a period of three and a half years. If I had known that, I should not have joined in the undertaking." It is all very well to say this after the event, and no doubt people persuade themselves of the fact ; but when I find that in this undertaking, though the prospectus states nothing of the position of the firm, neither whether its assets were equal to its liabilities, nor, if there was a deficiency, to what extent that deficiency went, yet no less than 200,000 shares were applied for ; and that only thirty or forty people went to look at the deed referred to in the prospectus—I am very much inclined to think that it is not to the deed or the terms of the transfer that people would have looked in order to make up their minds whether they would take shares or not. They would have done as Mr Peek, with perfect candour, tells us he would have done, " What," I asked Mr Peek, " would you have done, if you had known that there was a second deed ? Should you have insisted on seeing it before you took your shares ? " " No," says Mr Peek, " I do not think I should." I am quite sure he would not. The fact that the business to be transferred was that of Overend, Gurney, & Co.,—the fact that three or four gentlemen well known in the commercial world as men of wealth and standing were willing to embark large sums in this enterprise, and the reliance that was placed on the names of the Gurneys, would, no doubt, lead the unthinking multitude to embark their capital without any hesitation in a concern which everybody believed at that time would turn out profitable and advantageous.

Still this is not conclusive, and the question remains, whether it was not important to anybody who did not go blindly to work as the multitude do, but who was disposed to take a sensible and sound view of all the circumstances before he joined the company, that he should have a full opportunity of knowing the precise state of things before he embarked his money? Was it wrong that that information should be withheld from him? That it practically was withheld there can be no doubt. There is nothing upon the face of this prospectus,—upon the face of the articles of association,—upon the face of the first deed, to tell the shareholders that there was a deficit to the large extent to which the deficit existed, or to tell them that in respect of this deficit, or a considerable portion of it, they must trust to the private fortunes of the members of the old firm.

I dare say, if it had been all known, as I have just said, it would have made no difference. At that time the Messrs Gurney stood high in position in the commercial world. At all events it was known that they were men of large property, and if it had been said to anybody, "There may be a deficit eventually of one million, possibly of two millions, but then the Gurneys undertake to be responsible for the whole; they ask nothing at the present moment for the transfer of the business; you will get it for the price you pay for your shares without paying anything to them; the whole amount you pay will go into the funds of the new company, and will be available for the purposes of business; will you join?"—judge for yourselves what would have been the conduct of the applicants for 200,000 shares. How many, do you think, if they had known the whole arrangement, would have hesitated to embark their capital, as they did in ignorance, in the enterprise? You must judge of that. At the same time, if you think that this was a contrivance for the purpose of concealment; that it was a mode of giving effect to the conspiracy, if conspiracy there was; that it was intended to keep the

persons to whom it was proposed to take shares in the dark, from a fear that, if they had really known what the true circumstances were, they would not have come forward and paid in their money, and that the intention of the whole thing—this concealment included as part of the means resorted to—was to cheat and defraud the shareholders of their money,—then the necessary consequence must be that you must find some, if not all, of these defendants guilty.

But, on the other hand, if you should take the view that those who committed this act of reticence in a matter in which they ought to have been outspoken, honestly believed that the enterprise was a sound one, but, perhaps, may have thought it was just as well not to tell the shareholders all the precise circumstances of the arrangement, because it might operate upon timid or cautious persons, and induce them to withhold their contribution as shareholders, when in point of fact, if they could be induced to join, the enterprise would turn out for the company's benefit, and must in the end be beneficial—then the fraudulent and criminal intent alleged to have been at the bottom of this conspiracy fails. Though it may have been wrong that there should be two deeds when only one was referred to—and when one, no doubt, would have sufficed, if all the terms of the second deed had been, as they might have been, introduced into the first—though you may think that this was wrong and culpable, and that if the shareholders, upon coming to this knowledge, had insisted on having back their money, they would have been entitled, either by action or by suit in equity, to recover it; or, that upon its being attempted to make them pay the further calls upon their shares, they would have good ground for resisting, still—as I have before pointed out—this is not conclusive of the present question. If there was an arrangement not in itself a dishonest one, not dishonest *in se*, not dishonest as between the old firm and the new directors, who knew of its existence—not dishonest in any

way as between the old firm and the new shareholders, if it had been made known to them—but you think it was unduly concealed—then, according as you may think that it was concealed with or without the fraudulent intention of getting the money of the shareholders, and applying it to the purposes of the conspirators—according as you believe that they did, or did not, intend to get this money *per fas aut nefas*, and having got it, to divert it from its proper purpose, the common benefit, to the payment of their own debts,—you must find them guilty, or not guilty. If you believe that, though there may have been some impropriety, and something which would be fatal to them in a civil action, either brought by them as plaintiffs, or defended by them as defendants, yet that there was no intention to cheat or defraud those who became shareholders, the result must be the acquittal of the defendants.*

The Solicitor-General.—I do not know whether I quite understood what your Lordship said about the contingent liability. Your Lordship said there was a million of money uncovered still. That was true, of course, in the way your Lordship put it, and very true in a certain sense; but I do not know whether your Lordship quite appreciates that, as far as the case of both of us goes, these liabilities have always been treated as contingent liabilities, against which securities were held, and with regard to which it has turned out differently. Your Lordship will find that stated in Mr Harding's evidence, on the fourth day. No doubt your Lordship was perfectly right in the figures; but all I wanted to say was, that we understood, on both sides, that the fair result of the paper before your Lordship was, that the liability was considered to be so contingent, and the securities held against it so good, that it was never expected to become a liability.

The Lord Chief-Justice.—I called your attention to it, and told you what was the impression upon my mind.

* There was here a short adjournment.

The Solicitor-General.—If your Lordship will look at page 124, the fourth day,* you will see it. Mr Mellish would say that, so far as he was concerned, that was so.

Mr Mellish.—What I have always understood as being represented, or supposed to be represented, to the new directors, was this account in the hand of Mr John Henry Gurney, which your Lordship knows allows nothing for any loss on that guarantee, and brings out an estimated surplus of £170,000 without the good-will, and £670,000 with the good-will.

The Lord Chief-Justice.—No doubt; then it always occurred to me that there had been a gross oversight, because there were guarantees to the amount of a million.

The Solicitor-General.—If your Lordship looks at Mr Harding's evidence, it was contingent; in a good many cases the contingency never arose, and in many cases where it did, the amount realised was more than enough.

The Lord Chief-Justice.—We are considering what was the state of things then.

The Solicitor-General.—No doubt it came out very badly, like many other things.

The Lord Chief-Justice.—I challenged attention to it.

The Solicitor-General.—(Reading from the evidence):—

“The Lord Chief-Justice.—What are these guarantees? Were they sums that the old firm had guaranteed in favour of these parties—Rock, with the Imperial Mercantile Credit and Agra Bank?—(A.) Yes; the old firm have given certain guarantees in respect of transactions between other parties and themselves. (Q.) Had they become liable on those guarantees, or were they merely contingent liabilities?—(A.) Contingent liabilities. Mr Kenealy.—And they were transferred to the limited company?—(A.) No; I think not. (Q.) Possibly they went under the head of liabilities?—(A.) You asked me if they were assets; I said they were liabilities—contingent liabilities. (Q.) Were they transferred to the new company?—(A.) No;

* The printed notes of the shorthand writer.

I think not. (Q.) Were they retained in the old firm's hands?—(A.) They were not taken over by the limited company. (Q.) Consequently it was upon the old firm that the liability continued?—(A.) Yes. (Q.) Had you ascertained as a fact that the new company paid a great portion, if not all of those guarantees?—(A.) Many of the guarantees have never matured into claims. The Lord Chief-Justice.—On several of them the contingency has never happened?—(A.) No, my Lord; and where the limited company made any advances to enable the old firm to meet claims of this nature, the amounts were debited in the suspense and guarantee account. Mr Kenealy.—Can you tell my Lord and the jury in round numbers how much the new company paid in respect of those guarantees?—(A.) No. (Q.) Why?—(A.) Because I have not analysed the suspense and guarantee accounts." Then further on he is asked if a majority came to pass. Your Lordship says that is a vague term. Then he says, "I will take one item, and you will see what I mean. There is a guarantee dated the 30th of June, Imperial Mercantile Credit Company, for £120,000. That was secured by ships, and had not become a claim at the date of the suspension of the company. Subsequently the liquidators arranged with the Imperial Mercantile Credit Company that they should take over the ships," and so on.

The Lord Chief-Justice.—In the way I was putting the case to the jury, you must look to see what was the state of things at the time of the transfer.

The Solicitor-General.—I quite agree.

The Lord Chief-Justice.—At that time there were outstanding guarantees to the amount of a million.

The Solicitor-General.—That is quite true; I am not making the slightest complaint. I only venture to supplement that.

The Lord Chief-Justice.—I will take an opportunity of referring to it.

Gentlemen, I have drawn your attention to the three

first out of the four questions which I told you were involved in this inquiry—namely, first, the state of the affairs of the old firm at the time of the transfer ; secondly, if you should be of opinion that those affairs were desperate, and the concern worthless, whether that was present to the mind of the defendants ; thirdly, whether there was any misrepresentation or concealment by them of the true state of the affairs. We now come to the fourth head, which is, if there was any misrepresentation by the old firm and by the new directors, what was their intention in making it ? because, as I have more than once pointed out in this case, intention is everything. A guilty mind—what we lawyers call the “*mens rea*”—is essential to constitute a crime in the eye of the law. Misrepresentation or concealment may, as I have told you, afford matter of civil action and remedy. But you must have more than that, you must have the guilty mind, to constitute the offence with which the defendants are charged.

Now, no doubt every man must be taken, *primâ facie* at least, to have intended what are the natural and necessary consequences of his acts ; and if you find that there was misrepresentation, and that it has ended in defrauding the parties to whom it was addressed, the fair and legitimate inference is, that the intention was that the act done should carry with it the consequences that have followed from it. But this presumption may be rebutted by the other circumstances of the case ; and where intention enters so largely into the consideration of the question of guilt or innocence as it does in a charge of conspiracy and fraud, it becomes most important to look to see what motives could have operated upon the mind of the party charged to induce him to commit the offence. It becomes, therefore, very material to see what could have been the possible motives which operated upon the minds of these defendants to induce them to commit the offence with which they now are charged. Now, there is an obvious distinction, which has struck everybody from the beginning

of the case, and the learned counsel for the prosecution not less than anybody else, between the classes of defendants who are before you to-day.

With regard to the three defendants who joined the concern, Mr Barclay, Mr Gordon, and Mr Rennie, as well as the fourth gentleman, Mr Gibb, who is no longer amongst us, it was obvious that, if there was any fraud at the bottom of this affair, they were as much sinned against as sinning, and just as much victims, to the extent to which they embarked their capital, as any of the other shareholders who have reason to complain, or who have instituted this prosecution. But you are asked, on the part of the prosecution, to believe that these four gentlemen, wholly unconnected in point of interest with the old firm, for the purpose, I suppose, of propping up that firm, and enabling it to go on, were induced to join in the new undertaking, to which the old concern was to be transferred, at the sacrifice to two of them of no less than £50,000, to another of £25,000, and to another of £10,000, and embarked in what they not only knew to be a fraudulent scheme for swindling the public, but which they also knew to be one which must speedily end in ruin. It is but reasonable to ask what motive they had. Can you see any? None has been suggested, so far as I am aware, with regard to Mr Gordon, none with regard to Mr Rennie personally; but two firms with which he was connected had large transactions and dealings with Overend, Gurney, & Co., and it was suggested, more or less indirectly, that possibly Mr Rennie joined in order to get some advantage to these firms. It turns out, however, that, although very large sums of money had been advanced to these firms in the way of business by Overend, Gurney, & Co., every shilling of the bills on which those advances had been made has been paid and discharged. There is nothing, therefore, in the transactions between Cavan, Lubbock, & Co., and Mr Rennie's other house, and Messrs Overend, Gurney, & Co., in the slightest degree to show any motive which, so far as

we can see, could have been operating on the mind of Mr Rennie. Well, Mr Rennie takes 500 shares, and becomes liable for £25,000. Mr Gordon did not take so many, but he took 200, and became liable for £10,000. It is not unimportant to recollect what Mr Gordon's position was. He was chairman of the Oriental Bank, to which Dr Thom, with great propriety, when asked, gave the highest possible character. He was a man of position, a man of wealth; yet he is supposed, for no other conceivable purpose, except to support the firm of Overend, Gurney, & Co., to have run the risk, not only of sacrificing the £10,000 for which he thus became liable, but of compromising his name and position, by lending himself to the purpose of a positive fraud and swindle upon the public. Now, that is a view of the matter which I think a man must be very much blinded by prejudice to think of accepting, unless some other motive can be suggested. The same thing may be stated with regard to Mr Rennie, with the single exception of the dealings with his firm, which, as far as I can see, were not likely to have any influence upon him. Then the other two, Mr Barclay and Mr Gibb, were also men perfectly conversant with business. Mr Gibb was an old man of business. They took 1000 shares each, making themselves liable for £50,000 each. But then it is suggested that they were connexions of the Gurneys, and therefore were likely to join for the sake of upholding Overend, Gurney, & Co.

Mr Mellish.—Mr Gibb was no connexion of the Gurneys.

The Lord Chief-Justice.—I am much obliged to Mr Mellish for correcting me as to that. Well, then, we have here Mr Gibb, a man of business and experience, conversant with these things, and who must have accepted the proposal with a full knowledge of all the circumstances—for he is a party to these deeds—who takes 1000 shares, and makes himself liable to the extent of £50,000, not only thus endangering this large sum (and even to a man of wealth

£50,000 is not a drop of water), but, in addition, running the chance, not merely of the possibility, but almost of the certainty that this transaction would afterwards become known in its true character, and appear in the light of a great fraud practised on the public, in which case his character and position would be irretrievably gone.

In like manner, Mr Barclay takes his 1000 shares, and makes himself liable for £50,000. But then, it is said, he is a connexion of the Gurneys. Well, gentlemen, I do not know what your experience may be in life, but, as far as mine has gone, I have not known of an instance in which a man, simply because he happened to be a brother-in-law or some near connexion, has been willing to put down £50,000 in an enterprise which he knew must necessarily fail in a short time: for it must be remembered that the hypothesis is that this was known to be a rotten, worthless concern, which must come to grief before many months had passed over it. Here is a man who puts into it £50,000: do you believe that such a man, with a knowledge that such was its character, would do so? Can you believe that these parties knew that this fraud was contemplated, and were willing to become parties to it, not to gain anything, but with the certainty of thereby losing and sacrificing not only the money which they brought in, but that which to most men is more important than money—namely, honour, reputation, and character? To be sure, it is said two of these gentlemen were to be directors, and get £500 a year. What was the value of that? If the hypothesis of the prosecution is true, that the business was essentially rotten and valueless and must come to an end at the expiration of a short time, what would then be the value of this £500 a year, which, after all, as has been pointed out to you, was only to endure until the first meeting of the shareholders, who might at once put these directors aside, and which, at all events, could only endure for a limited period, at the expiration of which the directors in their turn would have to go out of the direction?

Then there is the fact, and certainly not an unimportant fact, that these four directors, two of them with such very large stakes, kept their shares to the very last, and have thus lost every farthing they have had to pay upon their shares up to the present time—two of them £40,000, another £15,000 or £20,000, I forget which, and another £8000. Is that compatible with the notion of these men having been aware of the rottenness of this concern and of the certainty of its downfall? If, as has so often proved the case in bubble companies and delusive fraudulent schemes, you had found the men who originated this company getting rid of their interest, or taking measures and resorting to contrivances for what is called rigging the market and sending up the shares, and then parting with their shares and getting out of the concern,—if you saw anything of that course of proceeding in this particular case, it would be cogent to lead you to the conclusion that there had been fraud at the bottom of it. But just as such a fact would fairly lead you to such an inference, so the absence of such a fact ought to lead to the opposite conclusion. If you see that these men, each of them, endangered a very large sum of money, and what is equally important to a man standing high in the commercial world, imperilled his reputation and his honour, that there was nothing that they could gain by it worthy of a moment's consideration, that they might have got out of all difficulty by getting rid of their shares, or, at all events, of the shares in excess of what was necessary to qualify them as directors; that they did not take that course, and that one of them, at a time when it was possible that this company, if it had been the bubble company which it is represented, might at any moment have come to grief, had, in addition to his 1000 shares, £90,000 of money for two months in the till of this company—looking at all these facts, and to what are the motives that usually actuate human conduct, can you come to the conclusion that these men intentionally entered into a scheme based in

fraud, and intended to carry out a most dishonest and nefarious purpose, when, upon the hypothesis of the prosecution, they must have entered into it with a conviction that it would soon, from its inherent worthlessness, come to nothing, so that they must be supposed to have voluntarily sacrificed all the money they put into it, with the nearly certain consequence of damaging their own reputations whenever its downfall should happen? If you cannot come to that conclusion, having regard to the motives which usually influence human conduct, ought you to hesitate about acquitting at least these three defendants? So much for those gentlemen.

Now, then, as regards the other three, who, no doubt, stand in a different position. What motive had Messrs Henry Edmund Gurney and Mr Birkbeck, the other two defendants, and Mr John Henry Gurney, who was not immediately a member of this firm otherwise than as a member of the Norwich firm, who had a certain share in this house, but was not an active managing partner in it—what motive had these gentlemen? You must give that question a fair and dispassionate consideration. Observe, that they gave up all their interest in the concern except that which was attached to the shares allotted to them as part of the purchase-money. They gave up the whole sum standing in the private ledger to their separate accounts: they gave up all claims upon the house in every respect: they pledged the whole of their fortunes, real estates, and personal estates, to satisfy the deficit which would still remain in the books of the company as against the old firm. Nay, more, while they were to have £500,000 as the price of the business, they practically gave that up; they were not to get a single shilling paid down. £250,000, as I have already pointed out to you, was to be written off against their guarantee. They only got, therefore, the prospective benefit of the £250,000, to be taken in shares, which, but for the terms of the bargain, they might have taken into the market and sold, but which

were not to be dealt with as theirs except for the benefit of the new company. These shares were to be hypothecated, and, in the event of their private property not being sufficient to cover the guarantee which they had given that the assets should be equal to their nominal amount, these shares were to go to meet the deficit which might remain. Thus they had no immediate benefit—none except what was contingent upon the success of the company, in which case their shares, if their private fortunes were sufficient to meet the demand upon them which their covenants had created, might be of value to them, but which, if the company failed, of course would be utterly worthless. But then, to be sure, Mr Henry Edmund Gurney and Mr Robert Birkbeck were to get £5000 a year as managing directors, the one for five years, the other for three, at the end of which time it would be entirely at the discretion of the shareholders whether they would continue in the office of managing directors or not. That may have been some motive ; but observe that it is no motive at all, if the hypothesis of the prosecution be a true one, because here, again, if the new company was such as has been represented, it necessarily follows that it was certain that the company must come to a stand-still, and break down, when, of course, there would be an end of the £5000 a year.

But then it is said, and I think there is some force in the observation, that “ the Gurneys were already insolvent, and that if this new company had not been created, they must have stopped, and would have been bankrupt, in which case all their private estates and personal property would necessarily have gone to meet the demands of their creditors.” That is quite true. Therefore, it is said, they gained this advantage, that they put off the evil day by interposing the new company between them and their difficulties, and got three and a half years during which to turn themselves about and see what they could do to meet the liabilities which they had incurred. They got that advantage which, to men embarrassed and in difficulty,

is always of some value, namely, the chances which arise from what has been not inaptly termed the chapter of accidents. Well, there is something in that; but here again the whole advantage which is thus alleged to have been derived by them from this arrangement is based upon the hypothesis that the company would go on. But what becomes of it if you say that the company was rotten and bankrupt, and must necessarily come to a stand-still? The moment the company fell, the Gurneys would necessarily be involved in the general ruin.

If the company was such that the inducing persons to take shares could not possibly arrest or delay, beyond a very limited time, the utter ruin and the eventual catastrophe which must ensue, what good would they get by putting off the evil day for the few months during which a mere bubble company could possibly continue its existence? You must take all those circumstances into account. If you are of opinion that there was at the bottom of the transaction this evil and wicked motive, and that for the sake of delaying their own downfall, which they knew must sooner or later happen, they invited persons to come into the business in its new form of a limited company as shareholders, and to pay the price of their shares, when they knew that, necessarily, from the nature of things and the state of its affairs, the company could not go on, and that every man who paid his £15 would as surely lose that £15 as the sun rises the next day in the east when it sets at night in the west,—if they knew and foresaw all that, and despite of it, with a view to their own private advantage, induced the public to come and take shares and pay a price on them, then they are guilty on this indictment. But if you think they entertained an honest, although possibly a mistaken belief, in common with the other directors, who were induced, under the influence of that common belief, to join them, that the company would in the end succeed; that its difficulties were only temporary and would be overcome; that its

powers of earning and making profits remained the same ; and that all that was necessary was to get rid of that portion of its affairs which had been a source of embarrassment and difficulty, and to infuse new blood into it and give it new vitality and life,—if that is what they believed, then, though you may think they were rash in such expectations, and that those who joined them in that belief were improvident and foolish, that is not sufficient to warrant a conviction on a charge which involves an intention to defraud.

You must be satisfied that there was the intention imputed to the defendants by this charge. The question for you is, whether they did intend deliberately, with a belief in the worthlessness of this concern, to delude and defraud those who might pay their money in order to become members of the company.

Now, gentlemen, we have gone through these four, to my mind, essential questions, and you will have first to say what was, in your judgment, the state of this company ; or rather (for that is the true form in which the question presents itself), what was the impression upon the mind of those who proceeded to the formation of this company—what was the state of their belief as to its condition and probabilities of its success ? I have drawn your attention to the figures upon which it appears to me that this question depends, to the amount of the deficit, to the sums by which that deficit might be reduced, and the figure at which it would eventually stand. I have not troubled you by taking you through all the details of figures, with which we were so much occupied during several consecutive days: the task would have been a hopeless one if I had attempted it. I confess that I have never been more bewildered in my life than I was by the figures which the accountants put before us. I am always unwilling to be the passive recipient of evidence which I do not understand, or to go through the mechanical process of carrying into my notes that which is unintelligible to my mind. I therefore did

my best to see if, by questions and cross-questions as we went along, I could make the evidence of the accountants intelligible to my own mind, and I fear I must have appeared troublesome to the learned counsel on either side, whose questions and cross-questions I very often interrupted. It was that I really could not follow the witnesses into all these details of figures.

"However," I said to myself, "the shorthand writers are taking notes, and those notes will be printed; I will study the figures and the evidence again before I come to address the jury in this case." Well, I did so, and the more I read, the more, I confess, I was bewildered, until at last the figures seemed to dance about in a sort of mazy labyrinth, out of which there was no possibility of extricating one's self. What with the unavoidable want of preparation on the part of the counsel for the prosecution, what with the fact that the principal witness, Mr Harding, had not had his mind directed to the various points relative to the accounts as to which he was to be examined, the confusion appeared to me to be at last perfectly bewildering. But I do not think that it matters at all, because it has seemed to me from the beginning that, in order to ascertain the true position of this company, it is not necessary to go into all these wearisome details of accounts and arithmetic. There are certain salient points, there are certain leading features about the case which I think, if you properly take them into account, will enable you to find a footing, and enable you to come to a conclusion that shall be satisfactory.

As I have said; the first question is, What was the earning power of this firm? What were the profits which that earning power ought to bring forth? Was that earning power continued to the last? If continued to the last, how was it that profits were not realised as in previous times? Are there any circumstances to account for it? Upon the whole, are you of opinion that the business, if relieved from the dead weight and pressure which this

accumulation of bad debts and of capital absorbed in these vain speculations had brought upon it, was a business which it was worth the while of a merchant or a company of merchants to purchase? I have pointed out to you what the deficit was. I have pointed out to you what were the sums by which that deficit was to be reduced,—in the first place, by the assets which it was expected would be realised; in the second, by the value of the guarantee and property of the members of the old firm.

In the course of the observations I made to you this morning, I stated that it appeared to me, that from the value of £2,200,000, which, according to the calculation in the estimate, was the value put upon that property, there ought to be deducted a million by reason of outstanding guarantees, which were stated to amount to somewhere about a million in round numbers, and which, although not actual and existing liabilities, were still contingent liabilities for which the private property of the partners would be liable.

My attention has been very properly called by the Solicitor-General and Mr Mellish, during the time you were out of court, to the fact that, of these contingent liabilities, according to the evidence of Mr Harding, a great many have never matured, having been satisfied by other parties or by securities that were held; and to such extent as you may think that those guarantees ought not to operate to reduce the sum which might be expected to be realised upon the estates of the partners, to that extent there is a still further, or there may have been expected to be a still further sum capable of being applied to the reduction of the liabilities which the new company agreed to take upon themselves. In that case the supposed deficit of a million at which I had arrived would not exist, and there would be a sum equal to the total amount of the property to be taken into account in the course of the time allowed to the old firm to realise the whole property, and thereby to liquidate the amount which they had guaranteed to the new company. You must take all these circumstances

into your consideration, and the question for you to determine upon it is, whether this was a worthless property, as has been described, or whether it was not ; or rather (for again this is the true question), whether it appears to you or not, that whatever was the amount likely to be realised, or certain to be realised in the future, there was a reasonable and honest belief—or rather, I should say, an honest belief, for the reasonableness of belief, though it may be one element of judging of its honesty, is not conclusive—an honest belief on the part of the persons who entered into this engagement, upon the basis of which the new company was formed, that this was an enterprise in which, though the ship was stranded for the moment, she would be got off, and having been relieved from the lumber of dead weight which had oppressed her, would again float upon the sea of commercial prosperity and success. If these parties did entertain that honest belief, though it may have since turned out to be fallacious, can it be reasonably contended that they can have contemplated the fraud which is ascribed to them by the prosecutor ?

The first question then is, What was the true state of this business ? The second, as I have said, is, What was the state of mind on the part of the defendants at the time of this transaction ? As to this, you are entitled, I think, to take into consideration what must have passed between the old directors and the new. You may see a little by that light. It seems impossible to suppose that the new directors did not make themselves acquainted with all the circumstances ; and if you are satisfied that the new directors could have had no sinister motive, and could have acted only on a sense of what was due to their own interests, and the interests of the shareholders they were about to invite to join in the same enterprise and to sail in the same boat, you may judge of the belief or motives of the one set of these parties, by what you cannot fail to believe was the true state of mind of the others. Then, as regards any misrepresentations which have been alleged to be made, as

to which you may think the prospectus went too far, or as to which it may have been deficient in not revealing that which it was essential for the shareholders to know, you have to judge of the guilt or innocence of these parties by the motives by which you believe them to have been animated. If you cannot see your way to the conclusion that they intended by false statements to induce persons to take shares, or that they combined to defraud and deceive and cheat future shareholders, though you may think they were unduly sanguine, though you may think they have not been as explicit in their statements as they ought to have been—that they have not, in that respect, acted with all the perfect openness and straightforwardness with which they should have conducted an operation of this kind, and the formation of a new company based upon it—yet here again the same question presents itself, What was the purpose? Was it to induce persons to join with them in a common enterprise, which they believed would be for the benefit of all, or was it for the purpose of inducing them to embark their capital in an enterprise which they knew must end fatally, but which they desired to foster and create for their own fraudulent and evil purposes? These are the questions which you have to determine; and in judging of the latter question, as I have already said, motive is everything. You must look to see what was the position of the parties; what they would gain and what they would lose; what there is which should lead you to think that they were led by sinister and criminal motives to embark in a gigantic enterprise of fraud, which was to bring desolation and misery upon the homes of hundreds—nay, perhaps of thousands.

Gentlemen, you have been told that your verdict is to effect great things—that the commercial world requires to be purified and regenerated, and that your verdict is to effect this important end. Do not be influenced by any such consideration. Independently of your verdict, it may be hoped that the memorable event of the downfall of this

company, and the presence at the bar of a criminal court of justice of men who once stood so high, will not be without its salutary and beneficial effects. We have been told that the commercial world is not animated by the lofty principles and the safe rules of conduct which used to influence its dealings ; that for the safe and sound principles upon which our fathers established the great commerce of this empire, and made the name of the British merchant respected to the uttermost ends of the world, there has been substituted a spirit of reckless speculation and of commercial gambling ; and that the name of the British merchant does not stand as high as it once did in the estimation of the world. If this be so, I trust that this memorable example will not be without its warning upon those who are growing up around us. Here we have an establishment doing a business almost unequalled, with the names of those who belonged to it known throughout the world as men of vast wealth, and of the highest commercial position. We have seen them "fallen from their high estate ;" and through what ? Through turning from the straight legitimate path of that commercial department to which they belonged, and going astray after vain and delusive phantoms, and embarking the capital, which should have been devoted to their own particular business, to wild speculations and rash enterprises. We have seen them fall into absolute ruin, their commercial position destroyed, their vast fortunes scattered to the winds, and their reputations impaired and tarnished. Last, we have seen them at the bar of this court, as defendants, on a charge of conspiracy and fraud. But I hope it is not only on the commercial world that the lesson, if necessary, will not be lost ; I trust it may not be without its influence upon the rest of society. There can be no doubt—no one who looks on what is passing around him can fail to see—that a spirit of speculation and gambling has taken possession of the minds of large masses of this community. Men who were wont to be satisfied with moderate gains and safe

investments, seem now to be led away by a spirit of greed and gain, and are ready to embark their fortunes, however hardly earned—the results, perhaps, of a life of thrift and toil—in the too often vain hope and expectation of realising something by premiums upon shares, or making more than the ordinary and safe gains of capital. We see this every day. If this example should teach those who are ready to follow the *ignes fatui* of such vain delusions, that you cannot gain extraordinary profits without extraordinary risk; that it is unsafe to trust to names, whatever those names may be, in enterprises of which you cannot comprehend the scope or the details, and in the management and superintendence of which it is impossible that you should have any part or parcel, and that, by so doing, though you may possibly gain something in some of these enterprises, in others you may find yourselves irretrievably lost and ruined, it will not be without its use. If this case shall have any salutary effect in checking the disposition to speculation and gambling which seems to pervade all classes, which has led to high and illustrious names being soiled and tarnished, and to men who ought to have set an example to the rest of the world being compromised in doubtful and disreputable transactions, so much the better. I should rejoice if such should be the result; but that is altogether beside the question you have to determine. The question upon which your decision turns is simply whether, if you think this business was worthless—that is, worthless with reference to the price to be paid for the shares—you believe that these gentlemen, who are the defendants upon the present occasion, knew that it was so. If you do not think it was worthless, the whole case falls to the ground; but if you think it was worthless, did they believe it to be such? and, believing it to be such, did they, for the purposes of fraud, endeavour to transfer it to shareholders, who should take it off their hands? If they did, they are guilty of this charge. If you cannot see your way to that conclusion; if the prosecution has failed to establish it;

if, looking at all the circumstances, though you may think there are parts of this transaction which are open to animadversion and blame, yet that the charge of intentional fraud fails, I am sure you will have satisfaction in being able to acquit them, so that to the (I had almost said) degradation—certainly, commercially speaking, the degradation—and, looking at their present position as defendants at the bar of this court on a charge of conspiracy and fraud, the social degradation—to which unfortunately they have fallen, shall not be superadded the painful consequence which must necessarily follow from a verdict of guilty. At the same time, if you are of opinion, upon the whole of the evidence, that the case is made out, no considerations of compassion or pity ought to stand between you and the verdict which, upon your consciences, it would then be your duty to pronounce.

Gentlemen, in the name of the country, I have to thank you for the very great care and attention you have exhibited throughout the whole of this important trial. Whatever may be the result of it, I take upon myself to say that no twelve men ever gave more undivided, unbroken, assiduous attention to a case, or ever have shown a more honest desire faithfully to discharge their duty.

The Jury retired at 2 o'clock, and were absent for a quarter of an hour, returning into court at 2.15.

The Associate.—Are you all agreed upon your verdict?

The Foreman.—We are.

The Associate.—Do you find the defendants guilty, or not guilty?

The Foreman.—Not guilty.

Mr Kenealy.—In this case, I believe it is necessary to ask your Lordship to make an order allowing the costs of the prosecutors, under the 24th and 25th of Victoria, chap. 96, sec. 121—"The Court before which any indictable misdemeanour against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner

as in cases of felony," &c. I have to ask your Lordship to certify that this is a fit case to be prosecuted.

The Lord Chief-Justice.—If you had confined the prosecution to the three original members of the old firm who are defendants, although I entirely concur, unhesitatingly concur, in the propriety of the verdict which the jury have returned, yet, believing that it was a case for inquiry as to them, and believing also that Dr Thom was actuated only by perfectly honest motives in instituting these proceedings, I should not have hesitated to allow the costs; but, inasmuch as, in my judgment and opinion, the uniting the other defendants in the same indictment, and proceeding against them in the same prosecution, was altogether an unjustifiable measure, I cannot allow the costs.

Mr Kenealy.—Your Lordship will not include me? I had nothing to do with it.

The Lord Chief-Justice.—No; I am merely identifying you with the prosecution. I must say that in the whole course of my experience I never met with a prosecution which, as regards those three defendants, I think was less warranted—at all events, they certainly ought not to have been included in the same indictment with the others, whereby those others were entirely precluded from calling them as witnesses. Under these circumstances, I think the prosecution has not been conducted as it ought to have been conducted, and therefore that I ought not to make any order. Besides which, I believe I could not do it. The indictment is removed by *certiorari*, and Mr Davis* tells me that it has been decided that the costs cannot be allowed in such a case.

* The able and intelligent officer at *Nisi Prius*.

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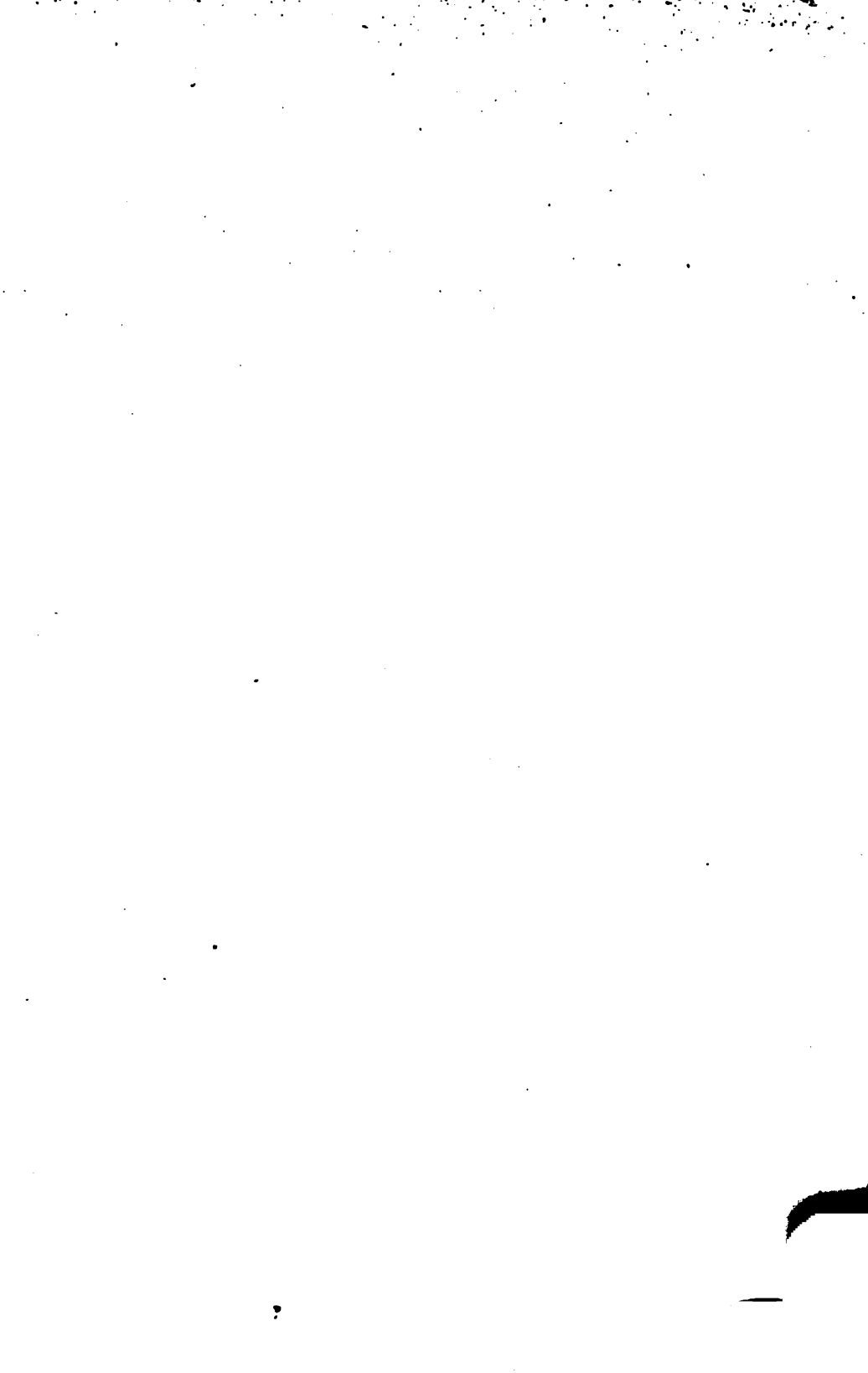
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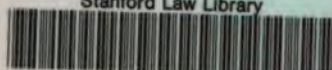
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